



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA**

AT NAIROBI

CIVIL APPLIC 37 OF 2007 (UR. 25/2007)

TRANSOUTH CONVEYORS LIMITED APPLICANT

AND

KENYA REVENUE AUTHORITY 1ST RESPONDENT

KENYA SUGAR BOARD 2ND RESPONDENT

(An application for stay of execution pending the lodging and hearing of an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Emukule, J.) dated 21st February, 2007 in H.C.MISC. APPL. NO. 120 OF 2007)

RULING OF THE COURT

The seasonal sugar-wars are here with us again! Happily this may be the last season as we are told the importation of duty free sugar from the COMESA region expires at the end of February, 2008 by dint of **Legal Notice No. 12/04**.

The matter now before us is a notice of motion filed by **M/S. Transouth Conveyors Ltd** (Transouth) under **rule 5(2) (b)** of the rules of this Court seeking three orders, namely: -

- “1. Pending the lodging, hearing and determination of the intended Appeal, there be a Stay of Execution of such part of the Order of the Hon. Mr. Justice Emukule made on 21st February, 2007 directing that the grant of leave shall not operate as a Stay.
- 2. Consequently, this Honourable court do order that the grant of leave in the NRB H.C.MISC. APPLICATION NO. 120 OF 2007 do operate as a Stay of the decision of the 1st Respondent contained in its advertisement in the Standard Newspaper of 2nd February, 2007 and the Kenya Times and Daily Nation Newspapers of 6th February, 2007 changing the effective date of importation of the 2007/2008 sugar quota to be imported duty free from the Common Market for Eastern and southern Africa (COMESA) Free Trade Area from 1st February, 2007 to 1st March, 2007 as published by the Kenya Sugar Board in the Kenya Gazette Number 296 dated 11th January, 2007 and further such leave do operate as a Stay of the 1st Respondent’s decision refusing to process the importation of the 5000MT sugar by the Applicant duty free being the subject of the customs Entry Numbers 612833, 614866 and

614748 lodged on 19th February, 2007 pursuant to the Gazette Notice Number 296 dated 11th January, 2007.

3. Further, this Honourable Court do order that pending the hearing and determination of the intended Appeal or the substantive Notice of Motion lodged in the superior court in respect of which leave was granted, the Respondents do preserve a portion of 5000MT duty free sugar from 2007/2008 quota of the 89000MT of the duty free Raw/Mill white (Brown) sugar from the COMESA Free Trade Area and allow the importation only 84000MT.”

The principles which guide the court in considering applications made under **rule 5 (2) (b)** are now well settled and we need only restate them from **Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd** – Civil Appl. No. Nai. 93/02 (ur), thus: -

“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

- 1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,**
- 2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”**

The order which is intended to be challenged on appeal was made by the superior court, Emukule J on 21st February, 2007, and a notice of appeal has already been filed and served. Before Emukule J. was an application for leave to seek judicial review orders which was dated 20th February, 2007 and was filed on 21st February, 2007 under **Order 53 rule 1 (2)** of the **Civil Procedure Rules** and **sections 8 and 9** of the **Law Reform Act**. Transouth was the applicant while the Kenya Revenue Authority (KRA) and the Kenya Sugar Board (KSB) were named as the 1st and 2nd respondents respectively. Transouth pleaded that it was a registered sugar importer and has been in that business for several years. By **Legal Notice No. 12 of 2004** which was published on 1st March, 2004, the Minister for Finance declared, *inter alia*, that quantities of raw and mill white sugar limited to 89000 metric tons may be imported duty free from the Common Market for Eastern Africa (COMESA) every year upto the end of February, 2008. As it is the duty of KSB, which is incharge of development of the sugar industry in the country to control such imports, KSB published a Gazette Notice on 12th January, 2007 advising all registered sugar importers that the importation of the 89,000 tons of raw/mill white sugar would be allowed between 1st February, 2007 and 28th February, 2008. It was **Gazette Notice No. 296/07** dated 11th February, 2007. The Gazette Notice was also published in local daily newspapers explaining that there was a looming sugar shortage in the country. Pursuant to those notices, Transouth imported some 5,000 metric tons of raw/mill white sugar from Egypt, a COMESA region member, worth USD 1,840,000 (approximately Kshs. 128 million) and expected that it would be cleared under the zero rated COMESA tariffs when landed as expected on 11th February, 2007. Some twenty (20) days after the KSB notices however, KRA published a notice in the local daily papers notifying sugar importers and the general public that duty free sugar importation for the quota ending 28th February, 2008 would commence on 1st March, 2007 and not 1st February, 2007. The notice was published on 2nd February, 2007 and was repeated on 6th February, 2007.

Transouth sought clarification from KSB on the apparently contradictory notices but KSB wrote back on 7th February, 2007 and confirmed that the period for importation had been determined as 1st February, 2007 and the imported sugar ought to be zero rated for duty. The letter was copied to KRA but KRA shot back with further notices on 16th and 19th February, 2007 clarifying that any importation of sugar before 1st March, 2007 would be subject to 100% duty per metric ton. Transouth felt helpless as it was now held captive by two quasi-government agencies who were at cross purposes but claimed legal authority for their respective actions. True to their threats, KRA received the import documents presented by Transouth on 19th February, 2007 for clearance of the consignment of 5000 metric tons but they were

ordered to pay 100% duty, which would be in excess of Shs.128 million. They believed KRA had acted without jurisdiction, capriciously, arbitrarily, with ulterior motives, and contrary to public policy. So they went before Emukule J two days later and sought leave to apply for: -

- *Orders of certiorari to quash the decision of KRA and the various notices it had published.*
- *an order of certiorari to quash KRA's decision made on 19th February, 2007 to charge 100% duty on the consignment.*
- *an order or prohibition to prevent KRA from levying Duty on the consignment.*
- *an order of prohibition to prevent KSB from withdrawing the Gazette Notice No. 296 of 2007.*
- *an order of Mandamus to compel KRA to process the importation of the consignment duty free.*

Transouth further sought an order that the grant of leave do operate as a stay of KRA'S decision in the notices it had published changing the date of importation and the further decision by KRA refusing to process the duty free importation.

Emukule J was satisfied upon perusal of the application that Transouth had made out an arguable or *prima facie* case as far as the prayers for certiorari and prohibition were concerned. He granted leave to Transouth to bring judicial review proceedings as prayed for in its application. The learned Judge however stated as follows in relation to stay: -

“In view of the clear dispute as to the determination of the effective date, for importation of COMESA Duty Free Sugar, in terms of Legal Notice No. 12 of 2004 dated 1st March, 2004 the leave hereby granted shall not operate as a stay.”

The substantive notice of motion was filed the following day and we are told, it is set down for hearing on 13th March, 2007.

Aggrieved by that part of the order of the superior court refusing to direct that the grant of leave shall operate as a stay, Transouth as stated earlier, seeks preservative orders pending the hearing of the intended appeal.

We have already stated the principles that guide the court in considering such applications. We need not belabour the issue as to whether the intended appeal is arguable or not frivolous since learned counsel for KRA, Mr. Ontweka conceded as much. A solitary issue, if it is arguable on appeal, is of course sufficient to warrant favourable treatment of an application under **rule 5(2) (b)** but several issues were raised by learned counsel for Transouth Mr. Mogaka. The central issue however, is whether there was any legal basis whatsoever for either of the two respondents to make the decisions they made and to issue the notices they issued which affected the applicant adversely in this matter. KSB, represented in this matter by Mr. Okubo Yufnalis, was emphatic that it was KSB which was the sole authority under the Sugar Act, to, *inter alia*, bring together imports of sugar, monitor the quality of sugar imported into Kenya, formulate price guidelines among members and generally to regulate and control all matters relating to the sugar industry. It was lawful therefore, particularly in the face of a looming sugar shortage in the country, that it invited the importation of sugar by registered importers with effect from 1st February, 2007 and it expected that KRA would handle the importation in terms of the Treaty signed with other members of COMESA in the year 2003. For its part, KRA, equally emphatically, states that it is the arm of the Ministry of Finance charged with statutory authority for revenue collection, administration and accounting. In that role, KRA is duty-bound to collect duties and other taxes for all imports unless they were exempted by law. As for the COMESA duty free sugar imports, the negotiated arrangements between Kenya and other COMESA members were published by the Minister for Finance in **Legal Notice No. 12 of 2004** to run for four years from 1st March, 2004 to 28th February, 2008. Specific quantities were also permitted for importation each year and have been so imported since March 2004.

Any imports purporting to be duty free, which would be made outside the parameters set in the Legal Notice would thus be misguided. According to KRA therefore the notices issued to the importers and general public relating to the importation dates was lawful and KRA must discharge its duty to collect taxes from imports falling outside the Legal Notice.

It is those altercations and polarized positions which have acquired some public notoriety as a dog-fight between the Ministry for Finance, under whose portfolio KRA falls, and the Ministry for Agriculture, under which KSB falls, in the scheme of administration although both are under the same Government. Sugar importers, like Transouth, consequently become unfortunate pawns in that arena and we agree with learned counsel that the intended appeal is not frivolous.

Would the success of the intended appeal if it succeeds, be rendered nugatory if this application is refused at his juncture? That is the next issue to consider.

Mr. Mogaka in his submissions was in no doubt that if no stay was put in place before the hearing of the intended appeal, then other registered importers would swamp the market with duty-free sugar from 1st March, 2007 and the applicant would be locked out. This was the final quota in the four-year period under the COMESA agreement. Indeed we were informed from the bar, and all counsel were agreed, that several ships had docked in the country ferrying in excess of 89,000 metric tons of sugar which was capable of exhausting the duty free quota once cleared on first come first served basis. Furthermore, Mr. Mogaka submitted, if no stay is granted KRA will demand the enormous sum of Shs.128 million towards duty from the applicant and such payment would cripple its finances before the intended appeal is heard and determined. In this plea Mr. Mogaka was supported by Mr. Okubo for KSB, on the ground that the applicant was an innocent importer who responded to the invitation of the only regulator for importation of sugar in the country and ought not to be punished. For his part Mr. Ontweka saw no reason for imposing any orders for stay because the substantive notice of motion before the superior court was scheduled for hearing on 13th March, 2007 and would be determined expeditiously. At all events the applicant was only a single importer who should not affect all other importers. The applicant should take the option of paying duty and claiming a refund from KRA if its appeal eventually succeeds or re-export the sugar if they cannot afford the duty imposed. Finally Mr. Ontweka submitted that the discretion of the superior court should not be disturbed without good reason because the applicants here have simply misapprehended provisions of the law and they ought not to interfere with the operations of KRA as they pursue their appeal.

We have anxiously considered the application, the affidavits in support and reply, and the submissions of counsel. We think, for our part, that the matter before us is peculiar and must be decided on its own peculiar facts. There is no doubt that the learned Judge of the superior court had an unfettered discretion to exercise in granting leave and in making the order now questioned by the applicants. In questioning the order however, the applicants are exercising their undoubted right to do so, and as we have already found there is an arguable appeal that will have to await the determination of this Court. Our discretion under **rule 5(2) (b)** is also original and unfettered. In our view, by the time the intended appeal comes up for hearing and determination, there is a fear which is not unfounded, that the duty free sugar quota for the year will have been exhausted and the applicant will have no alternative but to pay duty on the consignment they imported. There is no gainsaying that the duty, at shs.128 million is substantial by any standard. The contention that the amount can be refunded if the intended appeal succeeds provides no comfort to a party who, as stated by the applicant, had not made any provisions for payment of duty and it would seriously disrupt its operations. As in cases where a judgment-debtor is adjudged to settle a substantial money decree, it has become necessary for the court to qualify the usual principle that the success of a Money Decree, so long as it is certain that the respondent was capable of repaying the decretal sum, would not render an intended appeal nugatory. The qualification has to do with the interests of justice where undue hardship would be caused to the applicant if stay is refused purely on grounds that he can be monetarily compensated – see **Oraro & Rachier Advocates v Co-operative Bank of Kenya Ltd.**, Civil Appl. No. Nai. 358/99 (ur), **Clarkson (Insurance Brokers) Ltd vs. South Coast Fitness Centre** – Civil appl. 204/95 (ur) and **Trust Bank Ltd & Another vs. Investech Bank Ltd & 3 others** Civil appl. No. Nai. 258 & 315 of 1999 (ur).

We must therefore weigh the positions of the parties and having done so in this case, we are of the view that there is every justification for the applicant's position to be secured as doing otherwise would render the intended appeal nugatory.

What then are the orders we should make? We decline to grant orders 1 and 2 as sought in the application for the reason that such orders would, in effect, determine the intended appeal before it is considered by this Court. Granting prayer 3 as sought may also, in effect, interfere with the rights of persons who are not parties to this dispute. It may also encroach on the sanctity of the COMESA Treaty terms.

In all the circumstances, the orders that commend themselves to us and meet the justice of the matter are as follows: -

- a) *Upon the applicant providing a banker's guarantee for payment of the sum of Shs.128 million to the Kenya Revenue authority towards customs duty if the intended appeal fails, the Kenya Revenue Authority shall process the importation of the consignment of 5000 metric tons of raw/mill white (brown) sugar imported by the applicant under Customs entry Numbers 614833, 614866 and 614748.*
- b) *The said guarantee shall be provided within 14 days of the date hereof.*
- c) *In default of compliance with the above orders, the notice of motion dated 26th February, 2007 shall stand dismissed with costs.*
- d) *Costs of the application shall otherwise abide the result of the intended appeal.*

Dated and delivered at Nairobi this 12th day of March, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR