



Motrex Limited & another v Director General Kenya National Highway Authority (KENHA) & 3 others; Director of Weights & Measures Ministry of Industrialization Trade & Enterprise Development (Interested Party) (Petition 40 of 2020) [2024] KEHC 6217 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

PETITION 40 OF 2020

OA SEWE, J

MAY 30, 2024

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE CONSTITUTION OF KENYA CONTRARY TO ARTICLES 1,2,3,10, 20,21,22,23,23,25(C),35,40,47,48,50(1), 258 & 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 2,3,4,7,9,11 & 12 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015, LAWS OF KENYA

AND

IN THE MATTER OF WEIGHTS AND MEASURES ACT, CAP 513 LAWS OF KENYA AND IN THE MATTER OF THE PRINCIPLE OF LEGITIMATE EXPECTATION

BETWEEN

MOTREX LIMITED 1ST PETITIONER

WILLY WAWERU NGIGI 2ND PETITIONER

AND

THE DIRECTOR GENERAL KENYA NATIONAL HIGHWAY AUTHORITY (KENHA) 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

THE SUBORDINATE PRINCIPAL MAGISTRATES' COURT KALOLENI 4TH RESPONDENT

AND



**THE DIRECTOR OF WEIGHTS & MEASURES MINISTRY OF
INDUSTRIALIZATION TRADE & ENTERPRISE
DEVELOPMENT INTERESTED PARTY**

RULING

- (1) The Notice of Motion dated 12th March 2024 was filed by the 1st respondent, Kenya National Highways Authority (hereinafter, “the applicant”), under Article 259 of the *Constitution*, Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as Rules 19, 30 and 32(3) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules* and Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. The applicant seeks for the following orders:
 - (a) Spent
 - (b) Spent
 - (c) That pending the filing, hearing and determination of the appeal against the Judgment dated 1st February 2024, the Court be pleased to issue orders staying execution in this matter.
 - (d) That costs of the application be provided for.
- (2) The application was premised on the grounds that final judgment has been delivered in this matter awarding damages to the petitioner; that being dissatisfied with the said decision, the applicant intends to appeal against the judgment to the Court of Appeal; that the applicant is a public utility corporation holding public funds in trust for the State and all Kenyans and is likely to be threatened with execution unless stay is granted, and that it has an arguable appeal.
- (3) The applicant further contended that, while it stands to suffer substantial and irreparable loss if stay orders sought herein are not granted, the petitioner stands to suffer no prejudice which cannot be adequately addressed by an award of costs. Accordingly, the applicant averred that it is only fair and just that the orders sought be granted to enable it pursue its rights of appeal.
- (4) The application was supported by the affidavit of Dennis Cheruiyot in which he reiterated the grounds aforementioned and exhibited copies of the letter dated 11th March 2024 requesting for the proceedings, the Notice of Appeal and the Memorandum of Appeal dated 12th March 2024. Mr. Cheruiyot averred that the applicant stands to suffer substantial and irreparable loss unless the orders sought are granted.
- (5) The application was opposed by the petitioner. To that end the petitioner relied on the Replying Affidavit sworn by its director, Iqbal Ahmed Bayusuf. The petitioner’s contention was that the application is a non-starter in so far as no Notice of Appeal was filed within the 14 days provided for in law. The petitioner pointed out that the Notice of Appeal was filed 40 days after the date of judgment and that no explanation has been proffered for that inordinate delay. Hence, in the petitioner’s view, the application is an afterthought and has been brought only to delay the it from realizing the fruits of its judgment. On that score, the petitioner prayed for the dismissal of the application with costs.
- (6) Counsel for the 2nd and 3rd respondents had no objection to the application.
- (7) Although the application is expressed to have been filed under the provisions of the *Civil Procedure Act* and Rules, the applicable procedural rules to constitutional petitions and the applications made



thereunder are the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (otherwise known as the Mutunga Rules). In this regard, I entirely endorse the position taken by Hon. Musyoka, J. in *Francis Angueyah Ominde & Another v Vihiga County Executive Committee Members Finance Economic Planning and 3 others; Controller of Budget and 10 others (Interested Parties)* [2021] eKLR that:

“...it should be pointed out that the constitutional petitions are governed and regulated by the *Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013, so far as procedures and processes are concerned. They are not subject to the Civil Procedure Rules, which governs processes that are brought under the *Civil Procedure Act*, Cap 21, Laws of Kenya. So far as procedure is concerned, the *Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules*, 2013 captures the spirit of Article 159(2)(d) of the *Constitution*, which is an injunction against constitutional proceedings being hostage to technicalities of procedure, and which enjoins courts to protect and promote the principles of the *Constitution*. The focus is trained on substance rather than process. the *Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules*, 2013 are more flexible compared with the provisions of the Civil Procedure Rules, with respect to who may bring proceedings and the manner of initiating the proceedings.

(8) Accordingly, Rule 32 of the *Mutunga Rules* provides:

- (1) An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed.
- (2) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just.
- (3) A formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.

(9) In the case of *RWW v EKW* [2019] eKLR, the point was made to the effect that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

(10). There is no gainsaying that the applicant is a public entity and that it is funded by the tax payer. It has expressed its desire to appeal the decision of the Court dated 1st February 2024. On the other hand, the petitioner stands to suffer no prejudice that cannot be assuaged by an award of costs and interest on the principal sum.

(11) Accordingly, I find merit in the application. The same is hereby allowed and orders granted as hereunder:

- (a) That pending the filing, hearing and determination of the applicant’s appeal against the Judgment dated 1st February 2024, and order staying execution in this matter be and is hereby issued.



(d) That costs of the application costs in the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30th DAY OF MAY 2024

OLGA SEWE

JUDGE

