



REPUBLIC OF KENYA



KENYA LAW
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Kenya Revenue Authority v Law Society of Kenya & 3 others (Civil Application E195 of 2023) [2023] KECA 1388 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KECA 1388 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E195 OF 2023
HA OMONDI, JM MATIVO & GW NGENYE-MACHARIA, JJA
NOVEMBER 24, 2023**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

LAW SOCIETY OF KENYA 1ST RESPONDENT

THE NATIONAL ASSEMBLY 2ND RESPONDENT

**CABINET SECRETARY, NATIONAL TREASURY AND ECONOMIC
PLANNING 3RD RESPONDENT**

THE ATTORNEY GENERAL 4TH RESPONDENT

(Being an application for stay of execution pending lodging, hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Nairobi (Ongudi, J.) dated 12th May 2023 in Petition No. E050 of 2023)

RULING

1. The Notice of Motion Application dated May 16, 2023 brought pursuant to Rule 5(2) (b) of the [Court of Appeal Rules](#), and supported by the affidavit of even date sworn by its Chief Manager Domestic Taxes Department, Josephine Mugure, seeks stay of execution of the ruling, delivered on May 12, 2023 in Nairobi High Court Petition No E050 of 2023 Ongudi, J, and orders flowing there from, pending the hearing and determination of the applicant's intended appeal; stay of proceedings in the High Court pending the hearing and determination of the appeal; and the costs incidental to this application do abide the result of the said intended appeal.
2. The genesis of this matter stems from the decision of the appellant and the 2nd - 4th respondents to gazette, enact and enforce what the 1st respondent termed as 'unconstitutional, unlawful and unreasonable' [Excise Duty \(Excisable Goods Management System\) \(Amendment\) Regulations, 2023](#)



(hereinafter referred to as Regulations) vide Legal Notice No 30 of 2023. The said regulations were described as procedurally improper for failure to comply with mandatory provisions of the Constitution of meaningful and substantive public participation; that the regulatory impact assessment had not been tabled before National Assembly for consideration as required under section 11 of the Statutory Instruments Act; and substantively wanting, as they sought to adjust the price of excise stamps applicable to excisable goods by increasing the cost of these stamps, and the implementation threatened the survival of manufacturing businesses engaged in the sale of consumables, and innocent tax payers; and there was no justification in increasing the revenue stamps.

3. The 1st respondent moved the court vide a Notice of Motion application dated March 27, 2023, seeking conservatory orders to restrain the applicant from, inter alia implementing, administering, applying and/or enforcing regulation 5 of the Excise Duty (Excisable Goods Management System) 2023.
4. The application was opposed on grounds that the 1st respondent had failed to demonstrate the manner in which the principles of taxation as outlined within the Constitution had been violated; and the 1st respondent was seeking to illegitimately interfere with the exclusive mandate of the 2nd respondents in relation to the passing of regulations with regard to the implementation, administration, application and enforcement of regulations under the Excise Duty Act; and the application was premature since the Regulations were yet to be tabled before Parliament.
5. The High Court in granting the conservatory orders held that the 2nd and 4th respondents:

“... as State organs were required to carry out their mandate in compliance with the Constitution and the set statutory laws Exercise of this mandate contrary to the law, not only prejudices the petitioner but the public at large. In this matter, I am persuaded that the public interest outweighs the respondents mandate and tilts in favour of the petitioner.”
6. Aggrieved by this outcome, the applicant filed an appeal, and also sought the orders in this application. According to the applicant, it has an arguable appeal as amongst other issues to be canvassed is the question as to whether in issuing a conservatory order, the learned Judge failed to appreciate that the applicant had complied with Section 23 of the Statutory Instruments Act; whether the issue for determination was enforcement of the regulations by the applicant or the question of the legal process followed; whether there was a distinction between the application being premature on grounds that the regulations were yet to be tabled before Parliament vis a vis the regulations being in operation, and therefore capable of enforcement by virtue of section 23 of the Statutory Instruments Act; and whether the trial court failed to take into account the fact that the applicant's statutory mandate was to protect and safeguard revenue collection.
7. The applicant is also apprehensive that it stands to be gravely prejudiced and stands to suffer irreparable loss of revenue in terms of procuring Excise Stamps, as it will be forced to use taxes to procure the same.
8. The 1st respondent by a replying affidavit dated June 2, 2023 sworn by the its Chief Executive Officer (Florence Muturi), opposes the application, saying it does not meet the threshold for grant of prayers under rule 5(2) (b) as the grounds of appeal as framed are frivolous with no chance of success, and that should the orders sought not be granted the appeal will not be rendered nugatory; that the trial court properly held that the impugned regulations were enforced by the applicant without having the force of law, as they were not subjected to the interrogation by the National Assembly as the law making organ.
9. In addition, the respondent pointed out that the impugned regulations fell short of the mandatory requirement of public participation; they are improper as they seek to adjust the price of excise stamps



by increasing the cost of the stamps; the regulations fail the constitutional test of purpose and effect; will expose consumers to an oppressive and unsustainable cost of living; contravene the well settled principles governing taxation; and threaten the sanctity of the right to earn a livelihood and sustain one's life, and that the imposition of oppressive taxes is not constitutional. That in any event, the conservatory order did not prohibit or bar the applicant from collecting revenue based on the current stamps.

10. The invitation to this Court to intervene on behalf of the applicant has been invoked under rule 5(2) (b) of the [Court of Appeal Rules, 2022](#) which provides:

5(2) (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.

11. The principles that guide us in the discharge of our mandate under the above rule and which we fully adopt, have been articulated in a host of decisions by this Court, for instance in the case of [Stanley Kang'ethe Kinyanjui vs. Tony Ketter & 5 others](#) [2013] eKLR, this Court described an arguable appeal in the following terms:

“vii). An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.

viii). In considering an application brought under Rule 5

(2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.”

12. These principles were restated by this Court in [Multi Media University & Another v Prof. Gitile N. Naituli](#) [2014] eKLR to the effect that a court must bear in mind that each case must depend on its own facts and peculiar circumstances and the applicant must satisfy the twin principles taking into account that it is sufficient if a single bona fide arguable ground of appeal is raised, and that it need not be one that will necessarily succeed but one which ought to be argued fully before court and is not frivolous.

13. Needless to say, with regard to the first principle, what we are thus required to consider is simply whether there is at least a single bona fide arguable ground that has been raised by the applicant in order to warrant ventilation before this Court. Apart from the grounds in support of the application, we have also read the draft memorandum of appeal; and among the issues sought to be canvassed is the question of the relationship between a statutory provision *visa vis* mandatory requirement of the [Constitution](#). We are conscious that in the application before us we are not required to make definitive findings on the proposed grounds of appeal, as that is the function of the Court, which will hear the appeal. Without saying more lest we embarrass the bench that will be seized of the appeal, we are satisfied that the intended appeal is arguable.

14. The second ingredient, to consider is whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought. Again, drawing from the [Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others](#) (*supra*) this Court stated:

“The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”



See also *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227.

15. Will the applicant suffer substantial loss? Substantial loss is the cornerstone for an application for stay, and the applicant must show or establish factors that show execution will create a state of affairs that will irreparably affect and/or negate the very essential core of the applicant as a successful party in an appeal.
16. The applicant herein has laid out several reasons how and why it would suffer irreversibly, lamenting that the said ruling will interfere with revenue collection to the extent that it would not be able to recoup the excise tax for goods already sold during the intervening period, thus it is necessary to preserve the prevailing status quo in its favour. A keen reading of the petition shows that the 1st respondent is not challenging the applicant's mandate to collect excise duty *per se*, rather it is the threat of violation of the *Constitution*, arising from the legislation enacted by the 2nd respondent. Indeed, the impugned ruling demonstrates that the court did not stop the applicant from collecting revenue based on the old stamps, even as the petition awaits determination. Therefore, the claim that the appeal will be rendered nugatory on account of emasculation of its tax collection mandate is a far cry in the wild; and cannot hold.
17. The applicant has thus failed to satisfy the second sibling in the twin principle requirements under in a rule 5(2) (b) application, and the application must fail. The application is thus dismissed with costs to the 1st respondent

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

G. W. NGENYE – MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

