

REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: KOOME, M'INOTI & MURGOR, JJ.A.)

CIVIL APPLICATION NO. NYR 118 OF 2020

BETWEEN

ANTI-COUNTERFEIT AUTHORITY.....APPLICANT

AND

**JOHN KARIUKI T/A
KHIFRAM LIMITED.....1ST RESPONDENT**

**UZURI FOODS LIMITED T/A
GOLDEN HARVEST MILLS.....2ND RESPONDENT**

**OFFICER COMMANDING STATION,
RUNYENYES.....3RD RESPONDENT**

*(Application for stay of execution pending the hearing and determination of
an intended appeal against the judgment and decree of the High Court of
Kenya at Embu (Muchemi, J.) dated 17th November 2020*

in

HC Const. Pet No. 5 of 2019)

RULING OF THE COURT

The applicant, the Anti-Counterfeit Authority is before us in a motion on notice dated 14th December 2020 in which it seeks stay of execution of the judgment and decree of the ***High Court of Kenya*** at ***Embu (Muchemi., J.)*** dated 17th November 2020, pending the hearing and determination of an intended appeal. By the said judgment the learned

judge found that the applicant had violated the 1st respondent's rights and fundamental freedoms and awarded him damages of **Kshs 500,000**.

The background to the application is briefly that officers of the applicant, a state agency established under the **Anti—Counterfeit Agency Act, 2008**, descended on **John Kariuki's (the 1st respondent)** business premises where he was manufacturing and packaging flour for his own company and for **the 2nd respondent, Uzuri Foods Ltd**, and seized bags and bales of flour, packaging bags, a stitching machine, a weighing machine and some documents. The 1st respondent was arrested and detained overnight at **Runyenjes Police Station**, where he was charged with manufacturing counterfeit goods. He was released on a cash bail of **Kshs 50,000**.

The 1st respondent filed a petition in the High Court for, among others, damages for breach of his constitutional rights and fundamental freedoms, return of his seized goods, an order to quash the charges against him, and an order for release of his cash bail. The petition was resisted on the grounds that the 1st respondent was packaging low quality flour using the 2nd respondent's brand name and logo.

After hearing the petition, the trial court found that the 1st respondent was not informed of the reasons for his arrest and that his arrest was wrongful. Accordingly the court awarded him damages of **Kshs 500,000.00** and issued an order for return of his cash bail. That is the

decree that the applicant now seeks to stay pending the hearing and determination of its intended appeal.

In a bid to demonstrate that its intended appeal is arguable, the applicant relied on its lengthy memorandum of appeal which sets out 18 grounds of appeal. Among them is the contention that the learned judge erred in failing to find that applicant did not prove violation of his rights, in failing to hold that the applicant's arrest was justified and lawful, and by using wrong principles in the award of damages.

The applicant added that if the intended appeal is successful, it will be rendered nugatory because the applicant is a government agency that relies primarily on the exchequer and payment of the decree will disrupt its operations and lead to irreparable loss and damage. The **3rd respondent, the Officer Commanding Police Station, Runyenjes**, supported the application.

The other respondents did not file replying affidavits or submissions although they were requested to do so and notified of the hearing date. That in itself however, does not obviate the obligation on the applicant to demonstrate that in the circumstances of this application, an order of stay of execution is deserved.

As the applicant correctly states, to be entitled to an order of stay of execution, it must demonstrate that its intended appeal is arguable and unless the order of stay of execution is granted, the appeal will be rendered

nugatory if it succeeds.(See ***J. K. Industries Ltd. v. Kenya Commercial Bank Ltd [1982 – 88] KAR 1088***). Both of those considerations must be satisfied. (See ***Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31***).

Having carefully looked at the draft memorandum of appeal, we are satisfied that the intended appeal is arguable and the points the applicant intends to take up such as whether there was evidence of violation of the 1st respondent's rights, are not frivolous. As has been stated time and again, an arguable appeal is not one that must succeed, but rather, one that raises even single bona fide issue that deserves full consideration by the Court. (See ***Kenya Railways Corporation v. Edermann Properties Ltd, CA No. Nai. 176 of 2012***).

Turning to whether the intended appeal will be rendered nugatory if it succeeds absent an order of stay of execution, we bear in mind that this issue depends on the peculiar circumstances of each case and the concern of the Court always is to ensure that a successful appeal does not become a mere pyrrhic victory. The applicant must show that if what it fears upon execution of the decree came to pass, it cannot be undone or adequately compensated by an award of damages. In ***Stanley Kangethe Kinyanjui***

v. Tony Ketter & 5 Others [2013] eKLR, the Court expressed itself thus, on the issue:

“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”

The applicant has not averred that the 1st respondent is incapable of paying **Kshs. 500,000**. On the contrary, from the evidence on record, the 1st respondent is a businessman. In the absence of any evidence that the 1st respondent will not be able to compensate the applicant if the appeal succeeds, we cannot conclude that the intended appeal will be rendered nugatory. In the premises, the applicant having failed to satisfy both conditions precedent to an award of an order of stay of execution, this application is dismissed. Costs shall be in the intended appeal.

Dated and delivered at Nairobi this 19th day of March, 2021.

M. K. KOOME

.....
JUDGE OF APPEAL

K. M’INOTI

.....
JUDGE OF APPEAL

A. K. MURGOR

.....
JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR