



Dripcap Irrigation Ltd v Commissioner of Customs & Border Control (Customs Tax Appeal E029 of 2023) [2024] KEHC 7799 (KLR) (Commercial and Tax) (24 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7799 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CUSTOMS TAX APPEAL E029 OF 2023**

JWW MONG'ARE, J

JUNE 24, 2024

BETWEEN

DRIPCAP IRRIGATION LTD APPELLANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL RESPONDENT

RULING

1. Before the Court is the Appellant's Notice of Motion dated 9th August 2023, made under section 1A, 1B and 3A of the *Civil Procedure Act*, Article 159 of *the Constitution*, Section 53 of the Tax Procedure Act, Section 18 of the Tax Appeal Tribunal Act and Order 50 of the Civil Procedure Rules, seeking an order for stay of execution herein pending the hearing and determination of the Appeal.
2. The application is premised on the grounds set out on its face and the annexed affidavit sworn on the same date by the Appellant's director, MICHAEL OKACH OMONDI and written submissions dated 13th December 2023. In summary, the grounds are that the Appellant did not receive the audit finding and the demand notice dated 29th July 2022 within the stipulated period set in law; that there are questions regarding the authenticity of the demand for Kshs.15,907,640.55/= which, it argues, was at variance and in contradiction with Kshs.16,592,203/= on the notice for collection; that the Appellant filed an Appeal against the notice of collection before the Tax Appeals Tribunal (the Tribunal); that pending that Appeal, the Respondent filed an application to strike out the Appeal on the basis that the Appellant had breached the doctrine of exhaustion by failing to follow the dispute resolution mechanism under Section 229 of the EACCMA, 2004; that the Tribunal struck out the Appeal through a ruling dated 28th July 2023, precipitating the filing of the present Appeal.



3. The Appellant contended that this was a case fit for the grant of stay of execution pending hearing and determination of the Appeal because if stay is not granted and the Respondent proceeds with the demand, it stands to suffer prejudice, irreparable loss and damage.
4. In response, the Respondent filed a replying affidavit sworn on 30th August 2023 by its Customs Officer, DENNIS KABIRU and written submissions dated 16th October 2023. The Respondent argues that there is no positive or enforceable order from the impugned Appeal which is capable of execution by the Respondent; that the orders sought are incapable of being granted as the Appellant seeks stay of a negative order dismissing the application to file Appeal out of time; that the Appellant has not sufficiently demonstrated how the Appeal will be rendered nugatory or how it will suffer substantial loss or irreparable damage if the orders sought are not granted; that the Appellant has not demonstrated that it is able to settle the amounts owing or the costs of both the application and the Appeal should they be dismissed.
5. The Respondent urged that should the court be inclined to issue stay orders, the same be a conditional stay subject to the applicant issuing a bank guarantee for the entire amount of taxes collectable or payment of 50% in cash of the total amount of taxes collectable.
6. The Respondent further asserted that the application is frivolous, vexatious and an abuse of the court process; that the orders sought are not obtainable and the application is misconceived, bad in law and incurably defective. The Respondent reiterated that the Appellant has shown wilful disregard of the mechanism and processes laid out in section 229 of the EACCMA and breached the doctrine of exhaustion. For these reasons, it argued that it will suffer great prejudice should the Court grant the orders of stay, adding that the Appellant has not even disputed the additional taxes raised.

Analysis and determination

7. I have carefully considered the application, the grounds in support thereof and the affidavits and in opposition, the rival written submissions and supporting list of authorities. Two issues emerge for determination by the Court, to wit:-
 - (1) “whether the Court has the requisite jurisdiction to grant the orders of stay sought in the present application,”
 - (2) “whether the Appellant has satisfied the conditions for the grant of stay pending Appeal.”
8. From the record the Court notes that the Appellant filed the present Appeal against the Tribunal’s ruling of 28th July 2022 in Tax Appeals Tribunal Case No. 1398 of 2022. The Appellant was aggrieved by the Tribunal’s decision to strike out its Appeal on the basis that it breached the doctrine of exhaustion as it did not adhere to the dispute resolution mechanism processes laid out in section 229 of the EACCMA.
9. In its written submissions, the Appellant argues that its Appeal also seeks to set aside the impugned High Court ruling delivered on 9th March 2023 dismissing its Appeal in HCCOMM/CTA/E005 of 2023 without hearing the application on the ground that since the Appeal was against an order dismissing an application, there was nothing to stay. The Appellant also indicated that it seeks stay of execution of the impugned notice of collection dated 14th November 2022 pending hearing and determination of the Appeal.
10. The Appellant argued that the Respondent breached the law by failing to visit its premises as required to discuss how the audit exercise would be carried out and select a representative from the Appellant’s side who would participate in the audit exercise alongside the Post Clearance Audit Officers. The



Appellant also argued that in doing so, the Respondent flouted section 236 of the EACCMA, sections 21 and 23 of the EAC Customs (Investigation & Enforcement) Regulation which obligated it to write to the Appellant 15 days prior to the audit. The Appellant further argued that the Respondent breached section 4(3) (a) of the Fair Administrative Actions Act.

11. The Appellant further argues that Respondent failed to provide it with the final audit finding management letter and only produced the demand notice dated 29th July 2022, three and a half months after, on 15th November 2022 after it has served the notice of collection dated 14th November 2022; that therefore, there was no way the Appellant could have complied with the doctrine of exhaustion under section 229 (1) of the EACCMA; that the Respondent's decision based on non-existent final audit findings was suspect and meant to jeopardize the Appellant's business.
12. I have perused the Memorandum of Appeal and I note that the Appeal is only against the ruling of the Tax Appeals Tribunal at Nairobi dated 28th July, 2022 in Tax Appeals Case No. 1398 of 2022. I have also perused the impugned ruling and I note that the subject was the Respondent's Notice of Motion dated 20th March 2023 seeking that the Appellant's Appeal be struck out for being prematurely before the Tribunal.
13. I further note that the final orders of the Tribunal were to allow the said application; to strike out the Appeal and the Tribunal made no orders as to costs.
14. It is trite that a Court of law cannot issue stay orders in respect of negative orders where the Court has not ordered any of the parties to perform any task. This position was reinforced in the case of *Western College of Arts and Applied Sciences (Weco) v Oranga* (1976) KLR 63 the predecessor to the Court of Appeal found that:-

“But what is there to be executed under the judgment the subject of the intended Appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for stay, to ensue or to restrain by injunction.” See also *Gitundu v Watbuku (Civil Application E024 of 2021)* [2022] KECA 959 (KLR) (26 August 2022) (Ruling).

15. Accordingly, I find that the Appellant's Notice of Motion dated 9th August 2023 is devoid of merit and the same is dismissed with no order as to costs.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 24th DAY of JUNE, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

PARA 1.

Mr. Mkan for the Applicant/Appellant.

PARA 2.

No appearance for the Respondent.

PARA 3.



Amos - Court Assistant

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