



**Republic v Commissioner of Domestic Taxes; London Distillers (K)
Limited (Exparte Applicant) (Miscellaneous Application 004 of 2022)
[2023] KEHC 2717 (KLR) (Commercial and Tax) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2717 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 004 OF 2022
A MABEYA, J
MARCH 31, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

AND

LONDON DISTILLERS (K) LIMITED EXPARTE APPLICANT

RULING

1. This ruling disposes the Notice of Motion dated 29/9/2022 filed pursuant to sections 3 and 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 of the *Civil Procedure Rules*. The applicant sought a stay of execution of the ruling dated 16/9/2022, pending the determination of its intended appeal.
2. The application was based on the grounds that on 16/9/2022, the Court dismissed the applicant's Motion dated 1/4/2022 thereby upholding the respondent's decision of 2/3/2022 demanding payment of Ksh 517,118,680/- on account of tax, interests and penalties.
3. That the respondent may execute the afore-stated order by way of issuing agency notices and in any other manner in order to collect the said sum of Ksh 517,118,680/-.
4. That the intended appeal was arguable, meritorious, raises substantial issues of law and fact and has a reasonable chance of success. That the appeal raises complex legal issues on the powers of the National Treasury *vis-a-vis* the Kenya Revenue Authority. That therefore, unless the orders sought are granted, the intended appeal would be rendered nugatory.



5. The applicant averred that it would suffer substantial loss if the respondent executes the said order since its business would remain indefinitely paralyzed, with the applicant being unable to meet its obligations towards employees, customers and banks. That it would be exposed to insolvency proceedings and other multiple suits arising from the breach of its contractual obligations with third parties.
6. The applicant offered to deposit any security as may be imposed by the Court as a condition precedent for the grant of the orders sought. Finally, that no prejudice would be occasioned on the respondent if the orders sought are granted.
7. In opposition to the application, the respondent filed a replying affidavit sworn on 26/10/22 by Victor Mino, the Chief Manager in charge of the Debt Enforcement Unit at the respondent's office.
8. He averred that the Court made a finding that the respondent's demand for Ksh 517,118,680/- was not illegal, un-procedural or irrational. That there was no positive order capable of execution by the respondent other than the order for costs. That in the premises, the orders sought were incapable of being granted as the application sought to stay execution of a negative order.
9. That the applicant has not demonstrated how the appeal would be rendered nugatory if the orders sought are not granted. That there being no order for enforcement, there is equally nothing to stay.
10. The respondent urged that, in the event that the Court was inclined to grant the stay sought, the applicant be required to issue a bank guarantee for the entire amount of taxes or pay an equivalent of 50% in cash of the total taxes collectable.
11. The applicant lodged a further affidavit sworn on 10/11/2022 by Mohan Galot. He contended that the import of the ruling delivered 16/9/2022 was that the respondent was at liberty to proceed with enforcement measures for the recovery of the afore-stated amounts. That unless the stay was granted, the respondent would move with speed to recover the said sum thus rendering the appeal nugatory.
12. I have considered the affidavits and the submissions on record. This is an application for stay of execution. A grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the [*Civil Procedure Rules*](#). It provides: -
 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
13. In this regard, an applicant for stay pending appeal must show that he/she will suffer substantial loss unless a stay is granted, that the application has been made without unreasonable delay and must offer such security as might be ordered for the due performance of such decree or order as may ultimately be binding on the applicant.
14. Before considering the merits of the application, a preliminary issue was raised by the respondent. This was that there can be no stay because the order appealed against was in the negative. That it only dismissed the application and the only positive part was the payment of costs.
15. I agree with that submission. What the application that was dismissed was seeking was to quash the decision of the respondent demanding the payment of Ksh 517,118,680/-. All that the ruling of



- 16/9/2022 did was to dismiss that application with costs. There was no positive order or, the applicant was not required to do anything except pay the costs of the application which have not been assessed.
16. In this regard, I hold that to the extent that the said order was in the negative terms, it is incapable of being stayed. That is the law and I am unable to depart from it.
 17. Be that as it may, I should still consider the application on merit as I am not the final Court.
 18. The application was made on 29/9/2022. The ruling which is sought to be stayed was delivered on 16/9/2022. In this regard, the application was filed 13 days after the delivery of the ruling. In this regard, I find that the application was brought timeously.
 19. On the second limb of substantial loss, the applicant submitted that if the stay is not granted, the respondent would execute its demand for the sum of Ksh 517,118,680/- whereby the applicant would suffer substantial loss. That this because its business would be paralyzed and that it will be unable to meet its obligations towards employees, customers and banks since its accounts would be frozen.
 20. In *Mukoma v Abuoga* (1998) KLR 645 it was held: -

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
 21. In the present case, the respondent demanded taxes amounting to Ksh 517,118,680/- from the applicant. In the ruling of 16/9/2022, I found that the respondent’s decision of 2/3/2022 demanding payment of this sum was lawful and not illegal, irrational or un-procedural. This is so because, these were admitted taxes which the Cabinet Secretary, in abuse of his office, purported to give a waiver. The respondent has filed a notice of appeal dated 21/9/2022 in the Court of Appeal against that ruling.
 22. It is un-deniable that if the amount demanded is enforced, the applicant’s business may be crippled as it contended. It alleged that it would be unable to pay its employees and other third parties it as contracted.
 23. However, the Court is alive to the fact that these are admitted taxes being demanded. The nature of these admitted taxes militates against the notion of substantial loss. The monies constitute Excise and VAT that the applicant collected from tax payers and never remitted to the respondent. Then the Cabinet Secretary purported to waive the same.
 24. I am alive to the decision of the Court of Appeal in the case of *Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another* [2015] eKLR. In that case, the Court held: -

“In seeking to balance the interests of the respective parties, the approach we have always taken in determining whether or not to grant a stay of execution is to ensure that applicants are not denied their opportunity to ventilate their legal cases as afforded under the laws through the appeal process, with the possibility of success, while at the same time, respondents are not denied the fruit of judgment in their favour and their rights are safeguarded.”
 25. I note that the applicant offered to give security for the due performance of the order that would ultimately be binding upon it. However, for the reasons I have set out above, I find that the application is un-meritorious and I dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.



A. MABEYA, FCIArb

JUDGE

