



**Commissioner of Domestic Taxes v Mathu (Income Tax Appeal E081 of 2022)  
[2023] KEHC 18168 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18168 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E081 OF 2022**

**A MABEYA, J**

**MAY 26, 2023**

**BETWEEN**

**COMMISSIONER OF DOMESTIC TAXES ..... APPELLANT**

**AND**

**SAMUEL MWANGI MATHU ..... RESPONDENT**

**RULING**

1. The appellant moved this Court by way of a Notice of Motion dated November 10, 2022 expressed to be under sections 1A and 1B of the *Civil Procedure Act* and the inherent jurisdiction of the Court. The application sought orders for stay of proceedings of the Tribunal in Tax Appeals No 924 of 2022 until the determination of the appeal herein.
2. The grounds for the application were set out on its face and supported by the affidavit of Elisha Nyapara sworn on November 10, 2022. It was deponed that the respondent filed an appeal at the Tax Appeals Tribunal challenging the objection decision issued by the appellant on 6/7/2020. That the Tribunal rendered its judgment on December 15, 2021 dismissing the respondents appeal for reason that it was filed out of time and no leave had been granted for enlargement of time.
3. Consequently, the respondent filed an application dated 7/3/2022 seeking leave to file the notice of appeal and statement of facts out of time. In a ruling dated 29/7/2022, the Tribunal allowed the said application. The applicant was aggrieved by that decision and has appealed against it.
4. That despite the pendency of the present appeal, the Tribunal has continued to hear the appeal and it may conclude the same before the appeal herein is concluded.
5. The respondent opposed the application vide his affidavit sworn on December 2, 2022. He deposed that Tribunal had struck out his appeal on the grounds that the same was void and incompetent. That



- the Tribunal was not *functus officio* as it had not determined the appeal on merit as the appeal had only been incompetent. It was contended that the application did not meet the requirements for stay of proceedings.
6. The application was canvassed by way of written submissions which I have considered.
  7. The appellant submitted that Article 165(6) of the [Constitution](#) gave the court supervisory jurisdiction on subordinate courts and tribunals in ensuring that usurpation is avoided. That the Court was not mandated to delve into the merits of the appeal. Counsel submitted that the appeal herein challenged the jurisdiction of the Tribunal and absence of a stay of the proceedings of the Tribunal, the appeal herein would be rendered nugatory.
  8. On his part, the respondent submitted that the tax dispute was being handled through alternative dispute regulation and the matter was likely to be closed. That if the stay orders are granted, the tax claim would be due and payable before hearing the dispute on merit. It was submitted that the respondent had made an error and the same was regularized by the Tribunal.
  9. I have considered the record. This is an application for stay of proceedings In [Kenya Wildlife Service Vs James Mutembei](#) (2019) eKLR, Gikonyo J held that: -

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.
  10. Further, in [Global Tours & Travels Limited](#); Nairobi HC Winding up Cause No 43 of 2000 Ringera J, (as he then was) stated that: -

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice .... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”.
  11. In view of the foregoing, a stay of proceedings is a grave matter that impacts on the right of a party to an expeditious trial and should only be granted on case by case basis.
  12. In this case, the grounds for seeking stay of execution is that there is a likelihood that the Tribunal would continue to hear the matter and deliver a judgment to the detriment of the applicant. The applicant therefore urged the court to apply its supervisory jurisdiction to ensure that the Tribunal does not usurp its power.
  13. In [Standard Limited & 2 others v Wilson Kalya & another t/a Kalya & Company Advocates](#) [2002] Eklr, the Court of Appeal laid out conditions for stay of proceedings where the applicant must demonstrate that the appeal filed is an arguable one and that unless the order for stay of proceedings is granted, the appeal, if it were to succeed would be rendered nugatory.



14. I have perused the appeal in question and it is without a doubt that the appellant had raised an arguable appeal. The sole question is whether the appeal would be rendered nugatory if the proceedings are not stayed. The appeal challenges the jurisdiction of the Tribunal.
15. However, the appellant has failed to demonstrate how the proceedings before the Tribunal would affect the appeal. It is trite that the Court is in a position of overturning any decision by the Tribunal if the appeal succeeds. There is no compulsion that the proceedings should be stayed in the interest of justice.
16. In the upshot, I find that the application is without merit and dismiss the same with costs.  
It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

