



**Everest Enterprises Limited v Commissioner of Domestic Taxes (Income Tax Appeal E005 of 2023) [2023] KEHC 17783 (KLR) (Commercial and Tax) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17783 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E005 OF 2023**

**FG MUGAMBI, J**

**MAY 25, 2023**

**BETWEEN**

**EVEREST ENTERPRISES LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

*(Being an appeal against the decision of the Tax Appeals Tribunal delivered at Nairobi on the 27th January 2023)*

**RULING**

**Brief facts**

1. The Tax Appeals Tribunal on 23<sup>rd</sup> February 2023 delivered its judgment where it dismissed an appeal filed by the applicant herein and upheld the respondent's objection decision dated 26<sup>th</sup> May 2021. Aggrieved by the said judgment the applicant preferred an appeal before this court vide a Memorandum of Appeal dated 6<sup>th</sup> March 2023.
2. Before the appeal was canvassed the applicant filed the present application before court. It is dated 23<sup>rd</sup> February 2023 and is brought under Order 42 rule 6 and order 51 rule 1 of the [Civil Procedure Rules](#) 2010, Section 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law.
3. The application seeks the following orders;
  - i. Spent
  - ii. That pending the hearing and determination of this application inter partes, a stay of execution of the Tax Appeals Tribunal Judgment dated 27<sup>th</sup> January 2023 be granted ex parte in the 1<sup>st</sup> instance.



- iii. There be a stay of execution of the aforesaid judgment pending the hearing and determination of this appeal by this Honourable court.
- iv. That costs of this application be provided for
4. The same is based on grounds on the face of the application and a supporting affidavit sworn by Daniel Kihumba dated 23<sup>rd</sup> February 2023 which were further buttressed through written submissions dated 31<sup>st</sup> March 2023.
5. The totality of the applicant's contention was that it had preferred an appeal against the judgment of the Tribunal and the appeal has a high chance of success. The applicant submitted that the Memorandum of Appeal raised fundamental issues for determination and particularly the contravention of section 51 of the *Tax Procedures Act* as well as failure by the Tribunal to comply with section 29(3) of the *Tax Appeals Tribunal Act*.
6. The applicant averred that it was apprehensive that the respondent would start the execution process and the same would prejudice it, rendering the appeal moot. As a result, the applicant prayed for stay of execution of the judgment of the Tax Appeals Tribunal dated 27<sup>th</sup> January 2023. It stated that it was willing to issue bank guarantees of Kshs. 1,000,000/= to the respondent.
7. The applicant acknowledged that this court was vested with the discretion to grant security of costs and invited the court to consider the rationale in highlighted decisions while exercising this discretion. In particular the applicant invites this court to be mindful about the security of costs not impairing its operations which would then deem the respondent's efforts inoperable. The applicant further avers that it is a company of good standing and had complied with all the tax laws and regulations.
8. The application was opposed by way of a replying affidavit dated 20<sup>th</sup> April 2023 sworn by Shijenje Johnson. The respondent's position was that the applicant had not demonstrated a prima facie case with a high chance of success to warrant the grant of the orders sought. The respondent submits that the interests of the applicant ought to be balanced against the interests of the respondent and the public at large, who ought to be allowed to enjoy the fruits of the judgment of the Tribunal.
9. The respondent further submitted that the applicant had not in any case demonstrated that it would not be able to recover the disputed amount of Kshs. 78,254,959/= in taxes from the respondent in the event that the appeal was successful. Against this background the respondent argued that the security of Kshs. 1,000,000/= offered by the applicant was way too low and not proportionate to the judgment debt.
10. The respondent offered that in the event the court was inclined to grant stay, the same be granted on condition that Kshs. 39,254,959 / = being half of the taxes due should be paid to the respondent.

### **Analysis**

11. I have considered the rival pleadings, submissions and the authorities relied upon by the parties. The main issue for determination is whether the applicant has made out a case for stay of execution.
12. Order 42 rule 6 of the *Civil Procedure Rules* sets out the principles for stay of execution pending appeal. It stipulates as follows;

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court



appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.

No order for stay of execution shall be made under sub rule 1 unless:-

- 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. The Court of Appeal in the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 gave sufficient guidance on how a Court should exercise its discretion in considering a stay application and held that:

- “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.
3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the applicant had an undoubted right of appeal.
5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

14. There is no doubt that the application was brought without unreasonable delay. The Memorandum of Appeal also discloses arguable issues to be canvassed on appeal. Parties however contest the security that should be deposited. There is such a huge incongruence in the sums proposed as security. The applicant has offered to provide a bank guarantee of Kshs 1000,000/=. The respondent on the other hand proposes the amount of Kshs. 39,254,959/= being half of the decretal amount to be deposited as security.

15. The considerations that this court ought to take into account in determining the value of security appropriate in different circumstances have been laid out in numerous decisions.



16. In the case of *Francis Njoroge v Stephen Maina Kamore* [2018] eKLR the court observed that;

“One of the key elements a court is bound to consider when granting an order for stay is the security given by the Applicant for the due performance of the decree. And it is upon such consideration that a court of law will make a determination on the same. This court well considered the Applicant’s arguments on the same and made an order for the Applicant to deposit one half of the decretal sum in a joint interest earning account. This order was made after considering the arguments by the Respondent that he has a decree which he would like to execute versus the Applicant’s plea that he was in financial difficulties. Indeed, if parties were allowed to seek review of decisions on grounds that they are not in a position to carry out the orders sought to be reviewed, or rather that the orders are not convenient to them, then a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review.”

17. This court also notes that observations of the court in *Africa Oil Kenya BV v Commissioner of Domestic Taxes* ML HC TA No. E024 of 2020 [2020] eKLR, where it was stated as follows:

The duty of the court is to balance the interests of the applicant and to ensure that the appeal is not rendered nugatory or that its financial position is imperiled on the one hand by enforcement of the Tribunal’s decision. On the other hand, this court recognizes that the Tribunal has not made a decision that the Commissioner is entitled to enforce absent an appeal and an order of stay.

18. Taking into account the circumstances of this case, I find that it would be in the interest of justice that there be a stay of execution pending appeal to enable the parties canvass the appeal without rendering it nugatory. I am also cognizant of the need to balance and affirm the interests of the respondent who currently holds a decree and awaits to execute the same.

### **Determination and Orders**

19. In the circumstances, I hereby grant an order staying the execution of the judgment delivered on 27<sup>th</sup> January 2023 by the Tax Appeals Tribunal in TAT No 391 of 2021 on the following conditions;

- i. The applicant pays part of the decretal amount being Kshs. 25,000,000/= in a joint interest earning account in the names of the advocates for the respective parties within 30 days from the date of this ruling.
- ii. Should the applicant fail to meet this condition within this time, the orders for stay will be deemed to have automatically lapsed and the respondent will be at liberty to execute any time after the 30 days.
- iii. There shall be no orders to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 25<sup>th</sup> DAY OF MAY 2023.**

**F. MUGAMBI**

**JUDGE**

Court Assistant: Ms. Lucy Wandiri.

