



**Kenya Ports Authority v Commissioner of Domestic Taxes (Income Tax Appeal E054 of 2022)  
[2022] KEHC 15756 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15756 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INCOME TAX APPEAL E054 OF 2022  
DO CHEPKWONY, J  
NOVEMBER 24, 2022**

**BETWEEN**

**KENYA PORTS AUTHORITY ..... APPELLANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... DEFENDANT**

**RULING**

1. The appellant filed a notice of motion application dated May 13, 2022 under the provisions of order 42 rule 6(1) and order 51 rule 1, both of the *Civil Procedure Rules* and sections 3A of the *Civil Procedure Act*. By that application, the appellant seeks for the following orders:-
  - a. Spent;
  - b. Spent;
  - c. There be stay of execution of the judgment delivered on April 14, 2022 in Tax Appeals Tribunal No 105 of 2021, pending the hearing and determination of the applicant's intended appeal in the High Court;
  - d. The court be pleased to grant the orders sought herein subject to any conditions as the court may deem fit;
  - e. That the costs of this application be provided for.
2. The grounds adduced in support of the application are that the Tax Appeals Tribunal delivered a judgment on April 14, 2022 dismissing the appellants' appeal, thus upholding the respondents assessment of withholding tax emanating from Mombasa Port Development Project Phase 11 at Kshs 1,992,891,722. The projects are said to have been financed by Japan International Cooperation Agency



and paid directly to the main contractor Toyo Construction Company Ltd. As such, the projects were tax-exempted but the tribunal blatantly ignored to take that into consideration. That, albeit the appellant has lodged an appeal against the said decision, the respondent has instituted execution process by issuing agency notices to banks where the appellant holds accounts.

3. The application is supported by the affidavit of Robert Nyawara, the appellant's Principal financial officer who besides reiterating the ground on the application, has added that the intended appeal is not only highly arguable but also with high chances of success. That the appellant is ready to comply with any condition as the court may direct as precursor to granting the orders.
4. The respondent opposed the application vide a replying affidavit sworn by its accounts manager, Monica Muya on June 16, 2022. It is her case that the taxes having been confirmed by the tribunal, it is within the respondent's mandate to issue agency notices to the appellants' bankers pursuant to section 42 of the [Tax Procedure Act, 2015](#). Nonetheless, the agency notices issued by the appellant on May 6, 2022 and May 16, 2022 respectively were stayed vide orders issued in Mombasa JR Case No E015 of 2022. She adds that since the present application is a stay application brought under order 42 rule 6 of the [Civil Procedure Rules](#), the court ought to balance the interests of both parties and order the appellant to deposit 50% of the disputed taxes as security. The deponent went on to refer the court to various authorities including the case of [Corporate Business Forms Ltd v Kenya Revenue Authority \(Income Tax Appeal E001 of 2022\)](#), where the court ordered to be deposited 50% of the disputed taxes as security and the case of [Monaco Engineering Ltd v Commissioner of Income Taxes \[2021\]eKLR](#), where the court ordered a deposit of Kshs 20,000,000/=.
5. The application was canvassed by way of written submissions as directed by court on July 26, 2022 and as the record reflects, the applicant filed submissions dated June 29, 2022 while the respondents submissions are dated August 2, 2022. The submissions reiterate the summary I have laid down above, hence I do not wish to reproduce the same here.

### **Analysis and Determination**

6. I have considered the application at hand, the affidavits sworn in support and rebuttal of the same alongside the submissions made on behalf of the parties and the authorities relied on. The same being an application for stay of execution pending appeal, it is governed by order 42 rule 6(2) of the [Civil Procedure Rules](#). That provision lays down the conditions which an applicant must satisfy in order to deserve the orders of stay of execution pending appeal. It shows that an applicant must satisfy that he stands to suffer substantial loss if the stay is not granted, that the application has been filed without undue delay and lastly, that the applicant is willing to offer such security as may be ordered by the court.
7. In the present case, the impugned judgment of the tribunal was delivered on April 14, 2022 whereas the application for stay was made on May 13, 2022. I find no inordinate delay from the date of delivery of the impugned judgment to the date of filing the present application. Moreso, none of the parties intimated that the application had been filed after inordinate delay.
8. The second limb on the application is whether substantial loss has been established. In the present case, it has been denied that the respondents issued agency notices upon the appellants bankers in a bid to recover the assessed taxes. The agency notices were stayed *vide* orders issued by the Judicial Review court in Mombasa *vide* JR Case No E015 of 2022. The respondents have argued that it is well within its mandate to issue the agency notices since the assessment of taxes was approved by the tribunal. On the other hand, the appellant submitted that the transaction in question is tax-exempted contrary to the respondents' attempt to realize taxes from it. Thus, if stay is not granted, the appeal which in



the appellant's view is arguable, shall be rendered nugatory and such execution may occasion on it substantial loss.

9. It must be remembered that at this point the court is not making a substantive determination, and as to whether the transaction is tax- exempted, however arguable and meritorious, is an issue for consideration upon hearing of the appeal. On the same wavelength, this court should not make a determination that would render the appeal nugatory, rather the court is under the duty to balance the interests of the parties. To balance the rights of a party who wants to enjoy the fruits of his judgment and that of a party dissatisfied with a decision and who has mounted an appeal against the same judgment.
10. In the present case, given the core issue in the appeal is whether the appellant was tax-exempted, I am persuaded that the continued execution of tribunal's case *vide* the agency notices would occasion substantial loss on the appellant.
11. Lastly, on whether the appellant has offered security for due performance of the judgment on question, it is a common ground that under paragraph 12 of the affidavit sworn in support of the application, the applicant has expressed the willingness to comply with the terms the court may direct as condition for granting the stay sought. On the other hand, the respondent maintained that the appellant be compelled to pay and deposit 50% of the disputed taxes. In my view, the offer of security must always originate from the applicant and it suffices for the applicant to show the willingness to offer security or abide by any condition the court may direct. I am also satisfied that the applicant has met this condition and I am of the considered view that the application should be allowed with conditions.
12. Consequently, the appellants application dated May 13, 2022 is allowed on the following terms:-
  - a. An order of stay of execution be and is hereby issued staying execution of the judgment of the tax appeal tribunal dated April 14, 2022 in Tax Appeal Tribunal Appeal No 105 of 2021 and any further enforcement action thereon pending the hearing and determination of this appeal, or until further orders of the court.
  - b. In consideration of the stay in (a) above, the appellant shall deposit in a joint interest earning account in the names of the advocates on record the sum of Kshs 500,000,000/= within thirty (30) days from the date hereof. In default, the stay shall stand discharged automatically.
  - c. The costs of this application shall be in the appeal.
- 13 It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**D O CHEPKWONY**

**JUDGE**

In the presence of:

Mr Chege holding brief for Mr Miller for appellant/applicant

M/S Njuguna counsel of respondent

Court Assistant - Sakina

