



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**INCOME TAX APPEAL NO. 26 OF 2017**

**AWAL LIMITED.....APPELLANT**

**-VERSUS-**

**THE COMMISSIONER OF INVESTIGATIONS**

**AND ENFORCEMENT.....RESPONDENT**

**RULING**

By a Certificate of Urgency Application dated 16<sup>th</sup> November 2018, the Appellant/Applicant raised the following issues for determination:-

- a. This Application be certified as urgent and be heard *ex parte* in the first instance**
- b. An interim stay of execution of the judgment delivered on 18<sup>th</sup> October 2018 pending the *inter-partes* hearing of this application. The Respondent be stopped from taking any enforcement action with respect to the taxes in question pending the *inter partes* hearing and determination of this application**
- c. There be a stay of execution of the judgment delivered on 18<sup>th</sup> October, 2018 pending the hearing and determination of the intended appeal against the judgment delivered on 18<sup>th</sup> October, 2018. The Respondent be stopped from taking any enforcement action with respect to the taxes in question pending the hearing and determination of the intended appeal against the judgment delivered on 18<sup>th</sup> October, 2018.**
- d. The court do grant any other order it may deem fit and just to grant**
- e. The costs of this Application be granted.

The Application was supported by the affidavit of an authorized representative of the Appellant. The Appellant stated that various tax assessments were carried out by the Respondent for the years 2002 and 2003 which the Appellant objected to and challenged on appeal to the Tax Appeals tribunal. The Appeal part relating to income tax amnesty for 2002 and 2003 was not granted by the Tribunal. This instigated the Appeal in the High Court which upheld the decision on the income Tax Amnesty.

The Appellant prays that the Orders for stay of execution be granted to avert the Appellant from encountering substantial and irreparable economic hardship.

**THE RESPONSE**

The Respondent also through a Replying Affidavit dated 12<sup>th</sup> March, 2018 sworn by one of its authorized officers stated that the Appellant had not demonstrated the substantial loss it will suffer if the Orders sought are not granted. The Respondent further stated that if the court grants stay of execution pending appeal, there is a risk of the Respondent not being able to recover the outstanding taxes, if no security is provided.

The Respondent further stated that if the Court is inclined to grant stay then it should direct that half the decretal amount of taxes be paid to the Respondent and the other half be deposited in an interest earning account in the joint names of the advocates for the parties within thirty days from the date of the order.

## DETERMINATION

### Issue Arising

1. Whether the court should grant orders for stay of execution pending hearing of the Application and of the intended appeal.

The Court granted a ruling dated 18<sup>th</sup> October 2018, where L. J. Ngetich held;

**“the Tribunal decision dated 9<sup>th</sup> October 2015 is hereby upheld. Appeal is dismissed with costs to the Respondent.”**

Consequently, this Court maintained *status quo* on 21<sup>st</sup> January 2019 to date.

### ANALYSIS

#### **1. Whether the court should grant orders for stay of execution pending hearing of the Application and of the intended appeal.**

The conditions to be met before stay is granted are provided by the **Rule 6(2) of the Civil Procedure Rules** as follows;

**“No order for stay of execution shall be made under subrule (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.”**

Evidently, the three (3) prerequisite conditions set out in the said Order **42 Rule 6 of the Civil Procedure Rules, 2010** cannot be severed. The key word is **“and”**. It connotes that all three (3) conditions must be met simultaneously

The Court of Appeal in ***Butt v Rent Restriction Tribunal [1982] KLR 417*** gave guidance on how a court should exercise discretion 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 appellant 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.”**

The conditions of **Order 42 Rule 6** individually.

**a. Substantial loss may result to the applicant unless the order was made**

#### **G.N. Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bishar & another [2018] eKLR**

The Court of Appeal observed,

**“It was the considered view of this court that substantial loss does not have to be a lot of money. It was sufficient if an applicant seeking a stay of execution demonstrated that it would have to go through hardship such as instituting legal proceedings to recover the decretal sum if paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.”**

The Appellant argued that the amount in tax which is in issue is very substantial; it is in the figure of Kshs 196,347,652/- the Appellant would not survive enforcement of this sum as it faces the risk of insolvency if it is condemned to pay the taxes.

The Respondent opposed the stay of Appellant's payment of the amount as it will render the Appellant bankrupt as it is not enough in the absence of evidence to prove the substantial loss the Appellant will suffer if stay is not granted.

**Silverstein vs. Chesoni (2002)1 KLR 867**

Defines what substantial loss would entail;

**“issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory”**

In **Siegfried Busch vs MCSK [2013]eKLR** held;

**“A superior court to which an application has been made must recognize and acknowledge the possibility that its decision for refusal to grant a stay of execution could be reversed on appeal. It would be best in those circumstances to preserve the status quo so as not to render an appeal nugatory. Even in doing so, the court should weigh this against the success of a litigant who should not be deprived of the fruits of his judgment...”**

The Appellant has in its Memorandum of Appeal raised from the Ruling of this Court of 18<sup>th</sup> October, 2018 issues that are contested by Respondent's response and argument. Therefore, there is an arguable appeal. Should the Appeal succeed yet the Order for stay has been denied, the Appellant will suffer a substantial loss in the amount of Kshs. 196,347,652/-

**b. The application was made without unreasonable delay**

I am satisfied that there was no delay since the Memorandum of Appeal was filed within time as well as the present application. The Judgment was delivered on 18<sup>th</sup> October 2018, the instant application was made on 16<sup>th</sup> November, 2018.

**c. 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**

The Respondent prayed the court directs that half the decretal amount of taxes be paid to the Respondent and the other half be deposited in an interest earning account in the joint names of the advocates for the parties within thirty days from the date of the order.

The Appellant has in its submissions indicated that it no longer operates or carries out business since its assets were seized by the Respondent in 2015 at the initial stages of the dispute. The Appellant however has not proved this issue. There is also the question if the Appeal does not succeed, will the Appellant who is allegedly out of business be able to pay the decretal sum? The Respondent submitted that, the circumstances made it all the more reason why the Appellant should furnish security. The Court cannot interfere with a litigant's statutory right to appeal by imposing near impossible conditions where it is disclosed that the Appellant is not running the business. The Court will forgo the condition of the Appellant to deposit the security.

This Court has taken the following matters into consideration; the fact that from the Court record, there is no evidence of any steps taken to file an appeal in Court of Appeal since 2018.

The Appellant's disclosure that the business entity is not operational since the Respondent seized assets of the Company, there is no substantial loss, the Company is not running it is no longer a going concern. There is therefore no danger of irreparable loss and no subject matter to preserve or maintain so as not to render the appeal nugatory.

There has been since the Ruling of the Court; stay of execution in force to date.

**DISPOSITION**

Therefore, in light of these circumstances parties are granted 90 days from date of ruling to pursue appeal to Court of Appeal in default stay of execution abates forthwith.

**DELIVERED DATED & SIGNED IN OPEN COURT ON 28<sup>TH</sup> FEBRUARY 2020.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF**

**N/A FOR THE APPELLANT**

**CHABALA FOR THE RESPONDENT**

**COURT ASSISTANT – MR.TUPET**