



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**TAX APPEAL NO 25 OF 2017**

**COMMUNICATION CARRIERS LIMITED.....APPELLANT**

**VERSUS**

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

**RULING**

By Certificate of Urgency filed on 31<sup>st</sup> August 2017 the Appellant sought stay of execution of the Tax Appeals Tribunal decision of 22<sup>nd</sup> May 2017 or temporary injunction to restrain the Respondent, its agents or servants or its officers from proceeding with execution and/or implementation of the judgment of Tax Appeals Tribunal of 22<sup>nd</sup> May 2017.

The grounds are that the Respondent conducted an audit of the Appellant and issued a full compliance certificate in 2003.

Thereafter, the Respondent requested for documents and alleged that the Appellant failed to disclose its true tax liability. The Appellant obliged and produced the documents. The Respondent issued an assessment on 24<sup>th</sup> February 2005. Thereafter the Respondent irregularly, unprocedurally and unlawfully and issued a further amended assessment on 1<sup>st</sup> December 2006.

The Appellant was aggrieved with the Respondent's decision and appealed to the Tax Appeals Tribunal. After the hearing, the Appeals Tribunal dismissed the appeal on 22<sup>nd</sup> May 2017. In the Appellant's view the decision was based on open bias, the Tribunal refused consider submissions and evidence supplied by the Applicant utterly in error of law. The Appellant filed the appeal under **Section 32 of Tax Appeals Tribunal Act**.

The Respondent, through Assistant Manager from Investigations and Enforcement Department deposed that by virtue of **Section 13 of Kenya Revenue Authority Act, Cap 469** the Respondent is mandated to enforce provisions of **Section 5(2) (a) (i) of the Act, Part 1 of First Schedule of the Act, Income Tax Act and Value Added Tax Act**.

The Respondent did an assessment of the Appellant and investigations established tax arrears of the Appellant culminated to Ksh 280,194,246 as at 14<sup>th</sup> February 2007.

The Appellant appealed to the defunct VAT Tribunal which was succeeded by Tax Appeals Tribunal who delivered decision on 22<sup>nd</sup> May 2017 and upheld the assessment.

The Appellant sought to be supplied certified copies of the Tribunal's decision and proceedings vide letter and Notice of Appeal of 22<sup>nd</sup> May 2017 received on 25<sup>th</sup> May 2017.

On 21<sup>st</sup> June 2017, the Appellant filed Memorandum of Appeal contrary to provisions of **Rule 5 (d) & (e) of Tax Tribunal ( Appeals to the High Court) Rules 2015**.

The Appellant did not invoke **Rule 4 of Tax Appeals Tribunal (Appeals to the High Court) Rules 2015** upon receipt of certified copies of the decision to duly file the memorandum of appeal.

Therefore, the Respondent contends that in light of contravention of the relevant provisions of law, there is no appeal and no basis for this application.

**DETERMINATION**

## ISSUES

1. Whether there is an appeal
2. Whether the Appellant has an arguable appeal
3. Whether the orders sought should be granted

## ANALYSIS

Having read the Parties' pleadings and submissions, I proceed to analyze the issues as follows:

### **1. Whether there is an appeal**

Section 32 (1) of the Tax Appeals Tribunal Act (No. 40 of 2013) provides that:

*“A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.”*

The Respondent contends that the Appellant failed to comply with Legal Notice no. 226, The Tax Appeals Tribunal Act (No. 40 of 2013)

The Tax Appeals Tribunal (Appeals to The High Court) Rules 2015

Rule 5 which provides;

Memorandum of Appeal shall-

- a) be signed by the Appellant;
- b) contain an address of service of the appellant;
- c) set out concisely under consecutively numbered distinct heads, the grounds of appeal without any arguments or narrative;
- d) contain an index of all documents supporting the appeal with number of pages at which they appear; and
- e) Accompanied by a copy of the decision of the Tribunal and the notice of appeal.

The Appellant filed Memorandum of Appeal on 21<sup>st</sup> June 2017 and Respondent filed Grounds of Opposition on 6<sup>th</sup> September 2017 raised the issue of non compliance of **Rule 5 The Tax Appeals Tribunal (Appeals to The High Court) Rules 2015**. On 22<sup>nd</sup> May 2019, the Appellant filed Record of Appeal and hence is in compliance with the said Rule 5. There is a competent appeal pending.

### **2. Whether the Appellant has an arguable Appeal**

In Hadiya Construction & Mineral Limited v Ajabu East Africa Limited [2018] eKLR, The Court of Appeal held;

*“the arguability of an appeal can only be determined by the seriousness of the issues raised or intended to be raised. If the issues intended to be raised are frivolous, it cannot be said that the appeal is arguable. The appeal must raise bona fide issues.”*

In Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008, it was held that

*“an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.”*

Looking at the Appellant's Memorandum of appeal, I am convinced that the Appellant has an arguable appeal. The Points raised by the Appellant in my view, are arguable points, sufficient to invite the Respondents to respond to the matters raised therein, during the determination of the appeal.

### **3. Whether the orders sought should be granted**

Order 42 rule 6(6) of the Civil Procedure Rules provides:

*“Notwithstanding anything contained in sub-rule (1) of this rule the High Court shall have power in the exercise of its*

***appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from the subordinate court or tribunal has been complied with.”***

The Appellant herein is seeking a temporary injunction to prohibit the Respondent from executing or implementing the Judgment of Tax Appeals Tribunal pending the hearing of this Application and also pending the hearing and determination of the Appeal filed.

This Court has to consider the circumstances of the matter at this stage on whether a *prima facie* case is made out to warrant staying the orders of the Tax Appeal Tribunal pending hearing and determination of appeal and the Application herein.

The facts pleaded by parties as filed disclose a dispute as to tax remittance to the Respondent by the Appellant. The Respondent deponed that the Investigation on the Appellant tax remittance brought about an assessment of Kshs. 280,194,246.00/- which the Appellant claims was irregular, unprocedural and unlawful.

On the other hand, the Appellant pleaded that the Respondent issued it with a compliance certificate in 2003; however the same was not shown to have been produced in evidence in the Tribunal proceedings or annexed documents relied on by the Appellant in the Record of Appeal.

The Respondent submitted that the Appellant has not satisfied the requirements to warrant grant of the temporary injunction, that the Appellant has not established a *prima facie* case and not demonstrated how the implementation of the Tax Appeals Tribunal judgment will cause harm to the Appellant.

The Court in considering an application for injunction pending appeal, the principles as stated by Visram J(as he then was) are considered ***Patricia Njeri & 3 others v National Museum of Kenya [2004] eKLR*** namely:-

- a) an order of injunction pending appeal is a discretionary one and the discretion will be exercised against an applicant whose appeal is frivolous.***
- b) The discretion should be refused where it would inflict greater hardship than it would avoid.***
- c) The applicant must show that to refuse the injunction, would render the appeal nugatory.***
- d) The court should also be guided by the principles in Giella v Cassman Brown Ltd 1973 EA 358.***

Where an Applicant seeks a prohibitory injunction the Applicant must, as was stated in the celebrated case of ***Giella vs Cassman Brown & Co. Ltd (1973) EA 358***, establish the existence of a *prima facie* case with high chances of success. The Applicant must also show that he will suffer irreparable loss/damage which cannot be adequately compensated by an award of damages if the injunction is not granted, and/or that the balance of convenience tilts in his favour.

The Appellant has argued that the Respondent conducted investigations and issued the Appellant with a compliance certificate in 2003. The Respondent went ahead to conduct further investigations on the Appellant and issued an assessment of Kshs. 280,194,246.00/-. The Appellant argued that the whole process was irregular and unprocedural. The Appellant claims that it produced every document required by the Respondent but the same were not considered by the Respondent. The Tax Appeals Tribunal upheld the decision of the Respondent without considering the Appellant's case as alleged by the Appellant. From the circumstances surrounding this case, if the Applicant can show that the Tax Appeals Tribunal indeed acted irregularly, then the Appellant has a *prima facie* case with a probability of success.

The Appellant has indicated that if the Order for Prohibitory injunction is not granted, it is likely to lose Kshs. Kshs. 280,194,246.00/- which will cause harm by crippling its business operations and maybe rendering the Appellant bankrupt. The Appeal will be rendered nugatory.

***Reliance Bank Ltd v Norlake Investments Ltd[2002] 1 EA 227 at page 232; defines nugatory as;***

***The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.***

The Appellant also relied on the case of ***Charter House Bank vs Central Bank of Kenya & Others [2007] eKLR*** where C.A. held'

***“The purpose of granting an injunction pending appeal is to preserve the status quo and to prevent the appeal, if successful from being rendered nugatory.”***

The Appellant submitted that the Court should therefore preserve the *status quo* until the appeal is heard. If the Orders sought herein are not granted and the Appellant is forced to pay assessment as per the Decision of the Tax Appeals Tribunal, the Appeal will be rendered nugatory if the same succeeds against the Respondent.

On the other hand, this Court noted with concern; from the Court record that L. J. Ngetich granted Interlocutory injunction from 1<sup>st</sup> September, 2017 and the Appellant did not pursue the appeal. Thus the Court on 17<sup>th</sup> January 2018 by L. J. Ngetich wrote;

***“Due to lack of interest demonstrated by Appellant I do discharge interim orders issued on 1<sup>st</sup> September 2017. Date for appeal to be taken in the Registry.”***

Therefore, whereas the Appellant's have a competent appeal filed in Court and seek stay of execution and/or injunction, they have enjoyed maintenance of status quo since 2017. Litigation must come to an end. Therefore, although the circumstances of preservation of *status quo* pending hearing and determination of the appeal are legitimate and genuine, due to the unexplained delay of prosecution of the appeal for almost 3 years, this Court grants conditional injunction.

**DISPOSITION**

- 1. The injunction is granted to preserve and maintain *status quo* pending hearing of the appeal on condition the Appellant obtains hearing date and commences hearing within 90 days (3 months from today-date of delivery of Ruling)**
- 2. The Parties shall be accorded priority in taking hearing date(s) and o/or other Preliminary legal processes before the DR Commercial Division and /or Court.**
- 3. In default, the appeal shall stand dismissed for non prosecution.**

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

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**RACHIER & AMOLLO FOR THE APPELLANT**

**CHABALA FOR THE RESPONDENT**

**COURT ASSISTANT- MR. TUPET**