



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 4 OF 2017**

**In the matter of Articles 19, 20, 21, 22, 23, 47, 258 and 260 of The Constitution of Kenya**

**and**

**In the matter of contravention of Rights and Fundamental Freedoms under Article 47 of The Constitution of Kenya**

**and**

**In the matter of The Fair Administrative Action Act No. 4 of 2015, The Value Added Tax Act 2013, The Income Tax Act and The Kenya Revenue Authority Act**

**Between**

**Gibb Africa Limited.....Petitioner**

**versus**

**Kenya Revenue Authority.....Respondent**

**RULING**

1. By a Notice of Motion dated 17<sup>th</sup> November 2017, the Petitioner/Applicant seeks conservatory orders staying the judgement delivered in this case on 9<sup>th</sup> November 2017 pending determination of its intended appeal to the Court of Appeal.
2. The core grounds in support of the application are that the intended appeal has good grounds and reasonable prospects of success and that if the application is not allowed, the intended appeal will be rendered nugatory. It is also averred that the applicant will suffer substantial loss and that the balance of convenience favours the grant of the orders sought. A draft memorandum of appeal is annexed to the affidavit.
3. The application is opposed. On record is the Replying affidavit of Nancy Jemutai filed on 1<sup>st</sup> December 2017. She avers that the applicant failed to comply with Section 42 (6) of the Tax Procedures Act. [\[1\]](#) She also avers that the intended appeal is frivolous and denies the existence of the alleged agreement cited by the applicant and/or states its existence was not proved. She adds that the applicant has a legal obligation to pay taxes which continue to accrue and that substantial loss has not been proved. In the event the court grants the orders, she prays that the applicant be ordered to provide a Bank guarantee as security.

4. Rule 32 (1) of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides that "An appeal or a second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed."

5. The policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out. However, it is necessary to consider the considerations for granting applications for stay pending hearing and determination of an appeal. In this regard, the Court of appeal decision in the case of *Butt vs Rent Restriction Tribunal*[2] (**Madan, Miller and Porter JJA**) is worth quoting in which the court stated:-

*i. 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.*

*ii. 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.*

*iii. 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.*

*iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.*

6. It is clear from the wording of Order 42 Rule 6 (1), for an applicant to succeed in an application of this nature, he must satisfy the following conditions, namely; **(a) Substantial loss may result to the applicant unless the order is made; (b) The application has been made without undue delay; (c) such security as to costs has been given by the applicant.**

7. The corner stone of the jurisdiction of the court under the Rules is that substantial loss would result to the applicant unless a stay of execution is granted.[3]What constitutes substantial loss was broadly discussed by **Gikonyo J** in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto*[4] where it was held *inter alia* that:-

*"No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss... This is so because execution is a lawful process.*

*The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs. Chesoni.[5]...the 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"*

8. It is not disputed that the taxes are lawfully due. In fact, the taxes were not contested at the trial or in this application. It is not clear how the applicant will suffer substantial loss or if lawfully due taxes are recovered. The process used in recovering the taxes is a lawful process. Even if the applicant wins the appeal, it will still have to pay the taxes. Thus, the applicant cannot claim that it will suffer substantial loss by paying taxes which are not contested and which are lawfully due. In fact, it the Respondent who will continue to suffer if it is prohibited from collecting lawfully due taxes.

9. Similarly, if lawfully due taxes are recovered from the Petitioners debtors, through a process provided under the law, it cannot amount to "substantial loss."

10. It is important to emphasize that in a application of this nature, an applicant is required to place before the court sufficient evidential support, establishing substantial losses. This Court finds useful guidance in the following Indian Judgment that defined the term 'substantial loss' as:-

*" The words "substantial loss" cannot mean the ordinary loss to which every judgment-debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule, it is clear the words "substantial loss" must mean something in addition to and different from that."* [6]

11. Also relevant is the Indian case of *Bansidhar vs Pribhu Dayal* [7] where it was held that substantial loss ... should be a loss more than what should ordinarily result from the execution of the decree in the normal circumstances.

12. The other twin principle is whether the appeal will be rendered nugatory. Considering that the tax is not disputed, it is not clear how if the Petitioner pays lawfully due taxes its appeal will be rendered nugatory. The question of the appeal being rendered nugatory cannot arise in this case. This is because the appeal does not challenge the taxes. It only questions the issuance of tax notices, a procedure grounded on the law and whatever the outcome of the appeal, the taxes will still be payable.

13. In the case of *Global Tours and Travels Ltd* [8] it was held that:-

*".....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 interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, 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 timeously."*  
(Underlining provided)

14. Judicial discretion must be exercised upon reason. As stated above, the tax due is not contested. The Petitioner cites inability to pay and relies on a disputed agreement. With tremendous respect, I am not persuaded that the applicant has an arguable appeal. Having found that substantial loss has not been proved and that it has not been shown that the intended appeal will be rendered nugatory, I find no basis to exercise the discretion in favour of the applicant.

15. The balance of convenience in my view lies in favour of paying taxes. Financial inability on the part of the applicant to pay lawfully due taxes is not in my view sufficient ground to grant a stay. It justifies the Respondents basis for issuing the agency notices which are provided under the law. In the circumstances, I find and hold that there is no basis upon which the court can exercise its discretion and allow the application.

16. It is also important to bear in mind that the court is required to balance the interests of both parties. In *Machira T/A Machira & Co Advocates vs. East African Standard (No 2)* [9] it was held that:-

*"...to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the*

*application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.*

17. It is well settled that mere preferring of an appeal does not operate as stay of the decree or order appealed against. The power to grant stay is discretionary. To secure an order of stay merely by preferring an appeal is not a statutory right conferred on an appellant. A Court is not ordained to grant an order of stay merely because an appeal has been preferred and an application for an order of stay has been made. Depending on the facts and circumstances of a given case the Court, while passing an order of stay, must try and put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal.

18. It is my view that whatever the outcome of the intended appeal, it is highly likely that the taxes due which are not contested and which continue to accrue will still be payable. Granting a stay will in my view not satisfy the demand for justice for the Respondent especially considering the tax liability is not contested.

19. From the above authorities, I derive the following five principles in relation to the application before me. *First*, the court must take into account all the circumstances of the case. *Second*, a stay is the exception rather than the general rule. *Third*, the party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. *Fourth*, in exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered. *Fifth*, the court should take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered.[\[10\]](#)

20. The proper approach must be to make that order which best accords with the interest of justice.[\[11\]](#) If there is a risk that irremediable harm may be caused to the plaintiff if a stay is ordered but no similar detriment to the defendant if it is not, then a stay should not normally be ordered.[\[12\]](#) Equally, if there is a risk that irremediable harm may be caused to the defendant if a stay is not ordered but no similar detriment to the plaintiff if a stay is ordered, then a stay should normally be ordered.[\[13\]](#) This assumes of course that the court concludes that there may be some merit in the appeal. If it does not then no stay of execution should be ordered. But where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives in order to decide which of them is less likely to produce injustice.[\[14\]](#)

21. The grant of the order of stay pending Appeal is not as a matter of course, though a discretionary remedy[\[15\]](#) which must be exercised both judiciously and judicially.[\[16\]](#) The court in exercising its discretion must consider the balance of the competing interests and rights of the parties and justice of the case. The effect of the order is to deprive the successful party the profits of his judgment, a practice which the courts are reluctant to do. There must therefore, in order to succeed in an application for stay pending appeal, be a cogent, substantial and compelling reasons to warrant the deprivation of the victory of the successful party. The facts must be disclosed in the affidavit in support of the application otherwise the application is bound to fail.[\[17\]](#)

22. The fundamental principle that the judgment creditor is entitled to the fruits of his litigation can only be defeated by special circumstances which render it inequitable for him to enjoy the benefit of his victory.[\[18\]](#) The applicant must show special and exceptional circumstances clearly showing the balance of justice in his or her favour. Special circumstances which have received judicial approval are when execution would:-[\[19\]](#) **(a).** Destroy the subject matter of the proceedings. **(b).** Foist upon the court a situation of complete helplessness. **(c).** Render nugatory any order or orders of the appeal Court. **(d).** Paralyze in one way or the other, the execution by the litigant of his constitutional right of appeal. **(e).** Provide a situation in which even if the appellant succeed in his appeal there could be no return to the status quo.

23. Considering all the circumstances of this case, and balancing the prejudice to the parties, it appears to

me that there is a greater risk of harm to the Respondent if the stay is granted pending the determination of the appeal. It is my view that it has not been demonstrated that the appeal would indeed be rendered nugatory if a stay is not granted before the determination of the appeal. This is because as stated earlier, the tax liability is not disputed at all. The method used to recover the tax has not been shown to be illegal. The refusal of the grant of a stay of execution pending appeal is the order that I think would most accord with the interests of justice.

24. In view of my analysis herein above, I find that the application before me lacks merit. The upshot is that the application date 17<sup>th</sup> day of November 2017 is dismissed with no orders as to costs.

Orders accordingly

Signed, Dated, Delivered at Nairobi this 19<sup>th</sup> day of **December**, 2017

**John M. Mativo**

**Judge**

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[1] Act No. 29 of 2015, Section 42 (6) provides "When a taxpayer who has been served with a notice under subsection (2) fails to comply with the notice by reason of a lack of monies held by the payer on behalf of, or due by the payer to the taxpayer, the payer shall notify the Commissioner in writing within seven days of receiving the notice, setting out the reasons for the payer's inability to comply."

[2] Civil App No. NAI 6 of 1979

[3] See Gikonyo J in HCC NO. 28 of 2014, Trans world & Accessories (K ) Ltd vs Commissioner of Investigations & Enforcement

[4] HC Misc No. 42 of 2012 OR {2012} eKLR

[5] {2002} 1 KLR 867

[6] Learned Judge Vivian Bose A. J. C in the case Anandi Prashad v. Govinda Babu, AIR 1934 Nag 160 (D)

[7] AIR 1954 Raj 1, Learned Judge Dave

[8] WC No. 43 of 200 (UR)

[9] {2002} KLR 63

[10] {2011} EWHC 3544 (Fam)

[11] Philips LJ in Linotype-Hell Finance Limited v Baker [1992] 4 All ER 887, at page 3

[12] Ibid

[13] Ibid

[14] Ibid

[15] Vas wani Trading Company v Savalak & Co (1972) 12 SC. 77

[16] Mobil Oil (Nig) Ltd. v Agadowagbo (1988) 12 NWLR (Pt 77) 383, Marina v Niconnar Food Co.

Ltd. (1988) 2 NWLR (Pt 74) 75, Balogun v Balogun (1969) 1 All NLR 349, Olunloyo v Adeniran (2001) 14 NWLR (pt 734) 699, Okafor v Nnaife (1987) (1987) 4 NWLR (pt. 64) 129

[\[17\]](#) Onzulobe v Commissioner for Special Duties Anambra State (1990) 7 NWLR (pt 161) 252.

[\[18\]](#) Fawehinmi vs. Akilu (1990) 1 NWLR (Pt. 127) 450 @ 460.

[\[19\]](#) UNIPORT vs. Kraus Thompson Organization Ltd. (1999) 11 NWLR