



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.566 OF 2012**  
**BETWEEN**  
**CFC STANBIC BANK LIMITED.....PETITIONER/APPLICANT**  
**AND**  
**THE KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**  
**COMMISSIONER OF DOMESTIC TAXES.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Application before me is dated 29<sup>th</sup> May 2014. It is premised on **Rules 3(2)(3) and 8 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and Article 159 of the Constitution.**
2. The background to the Application is that on 7<sup>th</sup> March 2014, I dismissed the Petition filed on 10<sup>th</sup> December 2012 and the effect was that the Kshs.51,987,891.00 demanded by the Respondents being penalties and interest in respect of software costs incurred prior to January 2010 became immediately due and payable. It is important to note that Kshs.87,731,910.00 being the principal sum thereof had been paid and was not in issue.
3. Subsequent to the Judgment aforesaid, the Petitioner expressed its intention to appeal and on 12<sup>th</sup> March 2014 filed its Notice of Appeal in that regard.
4. The specific prayers now sought are the following;

“(1) ...

*(2) Pending the hearing and determination of this application, an order do issue reinstating the status quo ante obtaining prior to the 7<sup>th</sup> of March 2014, being that the Respondents be restrained whether by themselves, agents or assigns from collecting or recovering by way of distress, attachment of the Applicant’s bank accounts or by any other means whatsoever in the sum of Kshs. 51,987,891.00 or any sum over and above this as regards penalties and interest in respect of software costs prior to 1<sup>st</sup> January 2010.*

***(3) Pending the hearing and determination of the intended appeal against the order of 7<sup>th</sup> of March 2014, the status quo ante obtaining prior to the 7<sup>th</sup> of March 2014 be reinstated, being that the Respondents was restrained whether by themselves, agents or assigns from collecting or recovering by way of distress, attachment of the Applicant's bank accounts or by any other means whatsoever in the sum of Kshs.51,987,891.00 or any sum over and above this as regards penalties and interest in respect of software costs prior to 1<sup>st</sup> January 2010.***

***(4) The Court do issue such further orders as may be in the interest of justice.***

***(5) Costs in the cause."***

5. Only prayer 3 above is pending for determination as interim orders in terms of prayer 2 have already been granted.

6. In the Application, Supporting Affidavit of Mr. Eliud Ogutu sworn on 30<sup>th</sup> May 2014 together with its annexures as well in submissions by Mr. Ogunde, learned Counsel for the Petitioner, the Petitioner's case is that the intended appeal raises serious and important issues that merit determination on appeal. That unless the orders sought are granted, the intended appeal would be rendered wholly academic.

7. The Petitioner also contends that the intended appeal has good prospects of succeeding on the grounds set out at paragraph 12 of Mr. Ogutu's Affidavit which are as follows;

***“(12) (a) The Court erred in law and in fact in holding that no evidence was adduced by the applicant to show that there was retrospective application of law.***

***(b) The Court erred in fact in finding that there is no basis for the Applicant to claim that it was deprived of its property when it paid the tax as it made the payment willingly.***

***(c) The Court erred in fact in finding that the tax assessed was lawful despite finding that the law on taxation of computer software was ambiguous. The Court having found that there was ambiguity in the taxing statute had no option but to interpret the ambiguity in favour of the Petitioner.***

***(d) The Court erred in law and fact in finding that the Respondent had not breached the Applicant's legitimate expectation despite clear evidence to the contrary.***

***(e) The Court erred in law and fact in finding that the taxation of computer software was based on consensus between the Applicant and the Respondents.***

***(f) The Court erred in law and fact in finding that the Applicant had not demonstrated how its right to fair administrative action was violated.***

***(g) The Court erred in law and fact in finding that Petition lacked merit and that it was filed with mischief."***

8. Lastly, the Petitioner has submitted that its Application was made without delay and is prepared to abide by any condition to be imposed by the Court.

9. In response, the Respondents filed a Replying Affidavit sworn on 21<sup>st</sup> July 2014 by Mr. Lemmy Makazi as well Submissions by Miss Lavuna acting on their behalf.

10. Their case is that the demand for payment of Kshs.51,987,981.00 made subsequent to the judgment of this Court was proper despite the fact that the Petitioner had paid 100% of the interest and penalties not in dispute.

11. Regarding certain waivers that the Petitioner had allegedly obtained from the National Treasury, it was their response that they were unaware of a second waiver and any contention in that regard remains unsubstantiated. That the Application is in any event lacking in merit and should be dismissed with costs.

12. I note that what the Petitioner substantially seeks in what is generally called an injunction pending appeal. It must be recalled however that what was before this Court was a Constitutional Petition alleging *inter-alia* a violation of the right to property under **Article 40** of the **Constitution** and not a typical civil dispute between the parties. If that be so, then **Article 23(3)(b)** of the **Constitution** is pertinent in that one of the remedies available to a party alleging such violation is an injunction. At a general level, under **Rule 23** of the **Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules**, interim reliefs are available to parties such as the Petitioner litigating under the Bill of Rights. In that regard, I agree with Majanja J when he stated as follows in **Joseph Mugo Mwaura & 82 Others vs AG & 20 Others [2012] eKLR**;

*“Article 23(3) entitles the High Court to grant appropriate relief in respect of matters brought under Article 22. Apart from the specific relief in the nature of an injunction set out in Article 23(2) the Court can frame any relief that is appropriate in the circumstances. It follows therefore that such relief must also include such as is necessary to secure the applicant’s right to appeal and ensure that the appeal is not rendered nugatory and the right thereby protected is watered down.*

*To argue that the relief secured by Article 23 is diminished merely because there is lack of a specific provision in the Constitution or under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 is to undermine the Bill of Rights and its efficacy. I do not read Rule 23 to prohibit the Court from granting further relief after hearing and determining a matter.*

*I reject the Respondent’s argument that this Court lacks jurisdiction to grant interim relief pending appeal. I find and hold that this Court’s exercise of its power under Article 23(3) is entitled to give orders that give effect to the Bill of Rights including such orders as are necessary to preserve the subject matter pending appeal.”*

13. Having said so and as pointed out by Mr. Ogunde, the grant of orders of injunction pending appeal in constitutional matters is still largely governed by the same principles as in civil law and by Lord Megarry in **Erinford Properties Ltd vs Cheshire County Council [1974] 2 All E. R. 448** differentiated orders of stay of execution pending appeal and an injunction pending appeal in the following terms;

*“Although the type of injunction that I have granted is not a stay of execution, it achieves for the application or action which fails the same sort of result as a stay of execution achieves for the application or action which succeeds. In each case the successful party is prevented from reaping the fruits of his success until the Court of Appeal has been able to decide the appeal.”*

14. This Court in **Lillian Nkirote Marete vs AG [2013] eKLR** added as follows;

*“As to the principles to be applied in granting or denying an injunction pending appeal, Megarry J. quoted Wilson vs Church [1962] & All L. R. 466 where Cotton LJ held as follows;*

*“when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful is not nugatory”.*”

15. I shall adopt the same approach in this matter – See also **Barnabas Wachira vs IDB HCCC No.1436/2000** per Ransely J. and in that context should the Respondent therefore be denied the opportunity to recover the monies allegedly due to it by the grant of an injunction pending appeal?

16. I should, in answer to that question, dispose of one issue that was raised by both parties; the waivers allegedly granted by the National Treasury in favour of the Petitioner. In the Petition leading to my

Judgment of 7<sup>th</sup> March 2014, two sums of money were in issue i.e.

- i. Kshs.87,731,910.00 being the principal sum allegedly due and payable.
- ii. Kshs.51,987,891.00 and not Kshs.51,987,981.00 (as submitted by the Respondents) on account of penalties and interest.

17. It would seem that (i) above was paid and the question still remains whether Kshs.51,987,891.00 is due and payable. The question of waiver of that payment did not arise in the Petition and is also an issue outside the intended appeal. That is all I will say on that matter.

18. Has the Petitioner therefore met the test for grant of an injunction pending appeal? Elsewhere above, I reproduced the main grounds of appeal and without saying more than I should, they are not frivolous and are certainly arguable.

19. As to whether the intended appeal would be rendered nugatory and/or academic if the orders sought are granted, the sum in issue is large by any measure but again there is no evidence that the Respondents would be unable to refund it should the intended appeal succeed. It is a matter of common knowledge that the 1<sup>st</sup> Respondent routinely refunds much larger sums to deserving parties. The same goes for the test that damages may not be an adequate remedy, a principle wholly inapplicable to the Application before me, in any event.

20. Having so said, however, this Court must balance the interests of both parties against each other and in that regard, the Petitioner has offered to abide by any conditions to be determined by this Court.

21. In the circumstances, to ensure that the right of appeal is properly exercised and for the Respondents to be secured should the appeal fail the best orders to make are the following;

*i. Pending the hearing and determination of the intended appeal against the order of 7<sup>th</sup> of March 2014, the status quo ante obtaining prior to the 7<sup>th</sup> of March 2014 be reinstated, being that the Respondents was restrained whether by themselves, agents or assigns from collecting or recovering by way of distress, attachment of the Applicant's bank accounts or by any other means whatsoever in the sum of Kshs.51,987,891.00 or any sum over and above this as regards penalties and interest in respect of software costs prior to 1<sup>st</sup> January 2010.*

*ii. The above orders are granted on condition that within the next 45 days, the Petitioner shall issue a bank guarantee to the Respondents in the sum of Kshs.51,987,891.00 as security for payment of the said sum should the intended appeal not succeed.*

*iii. If the said guarantee is not given within the said period, the orders in (i) above shall lapse forthwith.*

*iv. Costs shall abide the Appeal.*

22. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF SEPTEMBER, 2015**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Kazungu – Court clerk

Mr. Twahir for Respondent

Mr. Kimani for Applicant

**Order**

Ruling duly read.

**ISAAC LENAOLA**

**JUDGE**

**11/9/2015**