REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 28 OF 2014

TRANSWORLD & ACCESSORIES (K) LIMITED…….
….....APPELLANT/APPLICANT

Versus

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT
….....DEFENDANT/APPLICANT

JUDGMENT

Agency notices: enlargement of time and stay of execution

[1] I am being asked by a Notice of Motion dated 29/1/2014 filed pursuant to order 42 Rule 6 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act (Cap 21) and Order 51 Rule 1 of the Civil procedure Rules and all other enabling provisions of the law to:-

> **a) Restrain the Respondents by themselves, their offices, servants, agent or any other person whomsoever from demanding issuing agency notices or in any other way enforcing the collection of the additional taxes amounting to Kshs. 53,793,340.00 the subject of the ruling of the Value Added Tax Tribunal (Nairobi area) on the 19/12/2013 in VAT Appeal No. 8 of 2013 pending the lodging hearing and final determination of the appellant's intended appeal.**
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> **b) Enlarge the for the filing of appeals from the VAT appeals Tribunal to the High Court under Section 33(2) of the Value Added Tax Act, 2009, Chapter 476 Laws of Kenya and allow the appellant to appeal the ruling of the VAT Tribunal, Nairobi area dated 19/12/2013 in VAT Appeal NO. 8 of 2013 outside of the statutory time of 14 days stipulated under Section 33(2) of the Value Added Tax Act, 2009, Chapter 476 Laws of Kenya.**
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> **c) Deem the memorandum of appeal annexed hereto as duly filed; and**
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> **d) Order costs of this application to be in the cause.**

[2] The application was supported by the affidavit of Agnes Njambi Mbugua on the grounds:-

a) That vide Respondent's letter dated 11/07/2007, the Respondent demanded from the Appellant, Kshs.240,772,869.00 in alleged unpaid taxes with interest and penalties for the period 1999 to 2003.

b) That the demand was preceded by a raid on the applicant's premises by the Respondent where the Respondent carted away all of the applicant's documents and computers.

c) That aggrieved by the Respondent's demand vide its said letter, the applicant objected the decision and engaged the Respondent with a view to resolving the issues.

d) That regrettably, the respondent remained adamant and in its letter dated 17/08/2012 demanded that the taxes be paid.

e) That the applicant being aggrieved by the Respondent's actions of raiding its premises and demanding the extra taxes, opted to pursue the appeal mechanism provided for under the law by preferring an appeal on the Respondent's decision in the VAT Appeal Tribunal

f) That the mater proceeded in the VAT (Appeals) Tribunal which rendered its ruling on 19th December, 2013 in which it dismissed the Applicant's Appeal and ordered that the Applicant must pay Kshs.53,793,340.00 in principal taxes together with interest and penalties therein.

g) That aggrieved by the said decision, the Applicant chose to appeal the decision in the High Court as provided for under Section 33(2) of the Value Added Tax Act, Chapter 476 Laws of Kenya (now repealed)

h) That the said ruling was given whiteout notice to the applicant and as a result the Applicant was not able to file an appeal within the 14 days stipulated in the law.

i) That there is extreme danger that the respondent will demand payment of the said taxes notwithstanding the applicant's appeal which will greatly jeopardize the applicant's appeal as well as violate its right of access to justice.

j) That there are glaring errors of law and fact in the ruling of the Tribunal and the appellant's intended appeal is arguable and has overwhelming chances of success.

k) That the demand was unlawful as the Respondent demanded taxes in respect of transactions done over five (5) years from the date of demand yet the Applicant was not required to keep records after five years. This is provided for under paragraph 7(6) of the Value Added Tax Regulations, 1994.

l) That the Respondent's demand was preceded by an unlawful raid on the applicant's premises and impounding of its documents thus denying the applicant the evidence it would have relied on in its defence.

m) That the collection of the said taxes by the Respondent from the applicant before the appeal mechanism is exhausted will be an affront to the applicant's right of access to justice as the intended appeal will be rendered useless.

n) That the requirement that the Applicant pays the dispute taxes as a pre-condition for appeal is an affront to the applicant's right of access to justice and will also prejudice the applicant's appeal.

o) That the Respondent's demand was irredeemably flawed as it was in contravention of the applicable laws and was not grounded on any substance but based on bank statements

and other illegally obtained documents.

p) It is imperative, only fair and in the interest of justice that the respondent is restrained from collecting the disputed taxes or in any other way enforcing the collection thereof so as to uphold the applicant's right of access to justice.

q) That it is in the interest of justice that Applicant is allowed to lodge its appeal out of time

r) That this application has been brought in good faith and without any delay on the part of the applicant.

s) The grant of the orders sought will not occasion the Respondent any prejudice that is incapable of compensation by way of damages.

t) The applicant stands to suffer irreparable loss and damage if the orders sought are not granted.

u) Unless a stay of execution is granted herein, the Applicant's Appeal will be rendered nugatory.

APPLICANT'S SUBMISSIONS

[3] The Applicant amplified the above grounds in its submissions filed in Court. It replied all the averments in the replying affidavits sworn by NICHOLAS KAMUYA NG'ARUA on 24th March, 2014 and NICHOLAS MURAGE sworn on 24th March through Supplementary Affidavit sworn by AGNES NJAMBI MBUGUA on 11th January, 2014. The Applicant says he should exercise its discretion and allow the Applicant to file appeal out of time. It cited the case of **JOAN YATICH KILELE v LAZARUS SUMBWEYO & 11 OTHERS (2005) eKLR** where the court stated:

> **"It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes into account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the Respondent if the application is granted."**

[4] The foregoing considerations were affirmed by Otieno Odek JA in **PETER WAWERU MWENJA v KIARIE SHOE STORES LIMITED (2014) eKLR** and **TERESIA WANGARI NDUNGU v PAUL KAMAU MWANIKI (2014) eKLR.** The Applicant contended that favourable exercise of discretion in allowing the appeal to be filed out of time will only help meet the ends of justice. The delay in filing the Appeal was not inordinate, and failure to file the appeal within time was inadvertent and excusable. Further, the applicant's appeal is not frivolous but arguable with overwhelming chances of success. And finally, unless the applicant is allowed to appeal the decision of the VAT Tribunal, it will suffer irredeemably as it will be forced to pay the disputed taxes yet it has been denied the opportunity to exercise the right of appeal. On the other hand, the respondent will not suffer any prejudice if the applicant is allowed to appeal the decision of the VAT Tribunal. It sought the Court to utilize its inherent jurisdiction in accordance with section 3A of the Civil Procedure Act Chapter 21 Laws of Kenya, and grant such orders as is necessary to make the ends of justice meet. So also should the Court be guided by Section 1A(2) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya in order to promote the over-riding objective of the said Act.

[5] The Applicant explained the delay is not inordinate because; the impugned ruling was delivered by the Honourable VAT Tribunal on 19/12/2013 without prior notice of the ruling; the Applicant's agent on record was only called the very morning of 19/12/2013 and informed of the

ruling. At the time, the applicant's agent had already closed his office for the December Holidays and could neither turn up for the ruling nor immediately apply for a copy of the ruling. The Applicant's agent opened his office on 14/01/2014 as he was out of town. He was able to obtain a copy of the ruling of the Tribunal on the same day but was unable to trace the Applicant's Directors until 26/01/2014 as they were out of town for the holidays. By this time, the time allowed for appeal had lapsed by one (1) day. Upon receipt of the ruling by the Applicant's directors, the applicant expeditiously brought this application. All this time, the Applicant or its Directors did not have prior knowledge of the ruling and could not be expected to be available otherwise than they had planned. Further, the ruling the subject of the Appeal was delivered on 19/12/2013 without proper notice when the Directors of the Applicant Company were proceeding for Christmas Holidays. Despite all this, the Applicant expeditiously moved this court for its orders in the instant application. Even in computing the time lost, the period between 21/12/2013 and 13/01/2014 should be excluded as provided for under Order 50 rule 4 of the Civil Procedure Rules, 2010 which provides;

> ***"when time does not run (order 59 Rule 4)***
>
> ***Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act;***
>
> ***Provided that this rule shall not apply to any application in respect of a temporary injunction."***

The delay on the part of the applicant was therefore only 3 days which was not inordinate and whose reasons have been explained above.

[6] On the prospect of the Applicant's intended appeal, it stated the appeal is arguable and is not frivolous. The Applicant annexed a draft memorandum of appeal which should be deemed as duly filed upon the grant of the orders herein. The draft memo of appeal carries 12 compelling grounds.

The most notable one is that the tribunal did not consider the fact that the respondent raided its premises and took away its documents and computers and did not return them in order that the applicant can use them in its defense at the Tribunal. Also the tribunal did not take into account that the Respondent's demand was not based on any factual transactions but on bank statements which were duly explained by the applicant. These grounds are arguable and not frivolous. So grant of leave will not prejudice the Respondent at all but the Applicant.

[7] The Respondent has not opposed the Applicant's application for stay except merely quoting Section 33(2) of the Value Added Tax, Chapter 476 laws of Kenya (now repealed) which provides for payment of disputed taxes before filing the Appeal for stay and we urge the Honourable court to find in favour of this supposition. The said section of the VAT Act does not in any way take away the inherent jurisdiction of the Honourable Court and is indeed inferior to the overriding objective that the court is called upon to uphold under the provisions of Sections 1A, 1B and 3A of the Civil procedure Act. Consider only the considerations for grant of stay pending appeal, i.e. whether the intended appeal is arguable and not frivolous and whether unless stay if granted, the Appeal if successful will be rendered nugatory. See the case of **GITHUNGURI v JIMBA CREDIT CORPORATION LTD (NO.2) (1988) eKLR 838** and **RELIANCE BANK LIMITED (IN LIQUIDATION) v NORLAKE INVESTMENTS LIMITED (2002) 1 EA 218** which was quoted with approval in the case of **BARCLAYS BANK OF KENYA V E VANS ONDUSA ONZERE (2008) eKLR** when E. O'Kubasu JA observed:-

> **"For an applicant to succeed, it must satisfy the twin guiding principles, first, that the**

intended appeal is arguable that is that it is not frivolous and second, that unless a stay is granted, the appeal or as in this case, the intended appeal, if eventually succeeds, will be rendered nugatory….."

The Applicant's appeal will be rendered nugatory if successful as it will have to embark on the most tedious and cumbersome process of seeking a refund from the Respondent which may not be successful and may force the Applicant to go back to Court to have the Applicant be compelled to refund the monies. We humbly submit that this is an unnecessary trouble that should not be visited on the Applicant. Apart from the foregoing considerations, the Applicant has satisfied all the conditions stipulated under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which are;

(a) Substantial loss may result to the applicant unless the order is made.

(b) The application has been made without unreasonable delay.

(c) Such security as the court orders has been given by the applicant.

[8] The Court of Appeal at Nairobi in the case of **BUTT V RENT RESTRICTION TRIBUNAL** (Madan, Miller and Porter, JJ.A) while considering an appeal from the High Court refusing a stay of execution pending appeal held;

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 principal 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 and refuse an application for stay will consider the special circumstances of the case and unique requirements"

[9] Substantial loss will occur. See the supporting affidavit sworn by Agnes Mbatha on behalf of the applicant at paragraph 22 and 23 because in the absence of stay of execution, the Respondent will rush to enforce the collection of the said taxes which will be an infringement of the Applicant's right of access to justice, fair trial and due process which is enshrined in Article 48 of the Constitution of Kenya, 2010. Further, the right of access to justice includes the right of appeal unimpeded to pursue the Appeal mechanism provided for under the law. See the case of **NDYANABO v ATTORNEY GENERAL** (Supra) where the court stated;

"A person's right of access to justice was one of the most important rights in a democratic society and, in Tanzania, that right could only be limited by legislation that was not only clear but which was not violative [sic] of the Constitution. The fundamental right of access to justice was what linked together the three pillars of the Constitution, that is, the rule of law, fundamental rights and an independent, impartial and accessible judiciary."

Therefore, any law (such as Section 33(2) of the Value Added Tax Act, Chapter 476 Laws of Kenya) which the Respondent is relying upon to demand payment of such colossal amounts in disputed taxes greatly curtails the Applicant's right of access to justice; it is unenforceable as it violated the Constitution. For those reasons, the Applicant is confident orders sought should be granted.

Respondent opposed the application

[10] The Respondent filed two replying affidavits by **NICHOLAS KAMUNYA NG'ARUI** and **NICHOLAS MURAGE.** It also filed submissions. It submitted that the application lacks merit because, whereas the Applicant contends the ruling was delivered without notice to them, they admitted their agent was called by the secretary to the tribunal and was informed of the Ruling. Therefore, the notice of the ruling was delivered on phone on the duly appointed agent of the Applicant. Their failure to attend for the Ruling does not invalidate the notice of delivery of ruling. See **C.A. NO 288 OF 2013 (UR 208/2013) KRA v TRADEWISEE AGENCIES LTD** where the Court of Appeal stated that:

> **''As is common knowledge, to benefit from the unfettered discretion of the Court under rule 4, it is imperative for the person seeking the favourable exercise off the court's discretion to place such material as will adequately inform the court in the exercise of such discretion''.**
>
> **''This was stated by Ringera J.A. in Bagajo v Christian's Children Fund Inc [2004] 2 KLR 73 (Civil Application No Nai 298 of 2003)**

[11] The Respondent was of the view that the Applicant has not demonstrated it deserves favourable discretion of the court and the application should be dismissed.

COURT'S RENDITION

Two requests

[13] The Applicant has made two major requests; stay of execution pending appeal and enlargement of time to file appeal. I propose to start with the second request which is fairly straight forward.

Enlargement of time

[14] Enlargement of time to file appeal is a matter of discretion by the Court. It is not a matter of course or right. Therefore, the applicant should always place such material before the Court as will be adequate to excite a favourable exercise of discretion. See the decisions by **Ringera J.A. (as he then was) in BAGAJO v CHRISTIAN'S CHILDREN FUND INC [2004] 2 KLR 73 (CIVIL APPLICATION NO NAI 298 OF 2003)** and **Kihara Kariuki J.A** in the case of **C.A. NO 288 OF 2013 (UR 208/2013) KRA v TRADEWISEE AGENCIES LTD.** I must add, however, the sufficiency of such material should be such that it satisfies the principles laid down in law for enlargement of time to file appeal, wherein the Court should take into account: First, the length of the delay; secondly the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly the degree of prejudice to the Respondent if the application is granted. These considerations were enunciated by **Gicheru, Lakha and Bosire JJA** in the case of **LEO SILA MUTISO v ROSE HELEN WANGARI MWANHI C.A. NO NAI 251 OF 1997 (UR)** which was quoted with approval in numerous other decisions of the Court of Appeal including **JOAN YATICH KILELE v LAZARUS SUMBWEYO & 11 OTHERS (2005) eKLR.**

[15] Doubtless, the right of appeal is an integral part of access to justice in our Constitution and all the above considerations, although they were formulated before the 2010 Constitution, answer to the need of allowing parties as much unhindered access to justice as possible in resolving their disputes; which is the greatest desire of the Constitution of Kenya, 2010. That is why the Court should look at the amount of delay involved, the explanation given for the delay, possibility of decimating an appeal when it succeeds, and eventually balance the prejudice to the Applicant's right of appeal against that of the Respondent on its right to the fruit of the judgment it holds in its favour. This Court has said time and again that where an explanation of the delay had been

offered, it is incumbent on the Court to evaluate it to see whether it is reasonable. I note the delay herein is not prolonged. It is a delay of three days as section Order 50 rule 4 of the Civil Procedure Rules applies in this case. However, shortness of the delay alone will not guarantee the Applicant an extension of time, but rather the explanation which is given for it and found to be reasonable by the Court. The explanation given herein is that the tribunal called the Applicant's Agent in the morning of 19th December, 2013 and informed it of the ruling. The said Agent had already closed office and was out for December holidays. Hence, was unable to attend for the delivery of the ruling. In addition, the Directors of the Applicant Company were also out of office for the December holidays. For those reasons, it was not until the 26th of January 2014 when the Applicant's agent was able to reach the Applicant's Directors on their return to the office and informed them of the ruling. Meanwhile, the Applicant's Agent made effort on resuming work and obtained a certified copy of the ruling on 14th January, 2014. The Applicant is, therefore, of the opinion that the ruling having been delivered without notice as by law required, not only violation of the law but also substantially caused the lapse herein. The Applicant also argued that its appeal is not frivolous and will be rendered nugatory unless time is enlarged to allow the Applicant to file appeal. It gave several instances to show its avowed positive prospects of its appeal's success. The Respondent on the other hand argued that the notice was given to the Applicant's Agent through phone on the day of delivery of the ruling and their failure to attend the delivery of the ruling does not vitiate the notice. They applied for the application to be dismissed.

[16] The arguments by the Applicant sound reasonable except the explanations that they as well as their Agent were away on December holidays required much more elaboration in the affidavit in support of the application. Canvassing such crucial matters through submissions is not the most appropriate way of placing materials before court in applications of this nature. I note, however, that the Applicant in the affidavit and the grounds on the face of the application alluded to the lack of notice and inability for them to act in good time. I will, therefore, give them the benefit of the doubt and accept the explanation as being reasonable. The foregoing aside, the other ground of lack of notice for delivery of the ruling is more profound and makes the intended appeal arguable. There are other points of strength of the appeal which have been argued by the Applicant. But I do not want to delve into the merits thereto. The statement that the appeal is not frivolous on the face of the draft Memorandum of Appeal is sufficient for purposes of enlargement of time; and I reserve the question as to whether the notice was proper or not for trial. The recapitulation of the law brings me to the point where I will, then, engage in balancing the rights of the parties; the prejudice to the right to, and prospects of the appeal on one hand, with the prejudice the Respondent will suffer in delaying its enjoyment of the fruits of its judgment on the other hand. Both parties have rights but in my view, there are no good reasons why I should deny the Applicant its right of appeal in the circumstances of this case. I will, however, say something more on that matter when I make my decision on the question of security and the request for stay of execution. At this juncture, I hereby allow the Applicant to file its appeal within 14 days of today.

Stay of execution

[17] Stay of execution pending appeal when it is sought from the High Court is governed by Order 42 of the Civil Procedure Rules which has set out the conditions the party applying must satisfy. These conditions are that:-

(a) Substantial loss may result to the applicant unless the order is made.

(b) The application has been made without unreasonable delay.

(c) Such security as the court orders has been given by the applicant.

Substantial loss

[18] The cornerstone of the jurisdiction of the Court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. What

constitutes substantial loss has been broadly delineated in the case of **BUNGOMA HC MISC APPLICATION NO 42 OF 2011[2013] eKLR** that

> **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...**

[19] See also how the court expressed itself on the delicate balancing act of rights in **BGM HCCA NO 107 OF 2012 [2013] eKLR** that;

> **[59] The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. Then the court is faced with a novel task of balancing the two competing rights to an almost constitutional symmetrical bound.**

[20] Under the command of the Constitution, I have made a conscientious decision to permit the Applicant to file its appeal out of time. In light thereof, I am persuaded to accept that substantial loss would occur to the Applicant unless a stay of execution is ordered especially taking into account that to allow the realization of the taxes allowed by the VAT Tribunal will be contrary to upholding the Applicant's right of appeal as an enabler of the right to access to justice. And applying the above test, and noting that this application was not made with any delay, I hereby grant a stay of execution of the decision of the VAT tribunal and or decree arising therefrom, if any. I am, however, minded that the Court should invoke or attach other measures to the decision granting stay of execution in recognition of the right of Respondent to its judgment. That will be clear shortly.

Security

[21] I have granted the Applicant a stay of execution of the decision of the VAT tribunal or decree but on condition that the Applicant deposits the entire decretal sum in an interest earning account at Milimani High Court, KCB Branch in the names of the Counsels for the parties, and the Deputy Registrar, High Court, Milimani Court within the next 120 days from the date hereof. This order recognizes the right of the Respondent to the fruits of the judgment in its favour and guarantees its satisfaction in the event the appeal is not successful. I make this order fully aware of the provisions of the VAT Act. I have specified the nature of the account, the Bank and the branch the account should be opened in, and the signatories to the account for the following reasons: One, the requirement of depositing the decretal sum in an interest earning account is in tandem with the economic realities on return on investment to the successful party in the matter. Two, the said sum is security to ensure satisfaction of the decree should the appeal fail, and should be so held in such form and location as the Court shall designate. And, three, as such security, the Registrar of the Court must be a signatory to the account. It is so ordered.

Dated, signed and delivered in open Court at Nairobi this 30th day of September, 2014

F. GIKONYO

JUDGE