



**Asvin v Commissioner of Domestic Taxes; M Oriental Bank & another (Interested Parties) (Tax Appeal E103 of 2024) [2025] KEHC 2825 (KLR) (Commercial and Tax) (10 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2825 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
TAX APPEAL E103 OF 2024  
JWW MONG'ARE, J  
MARCH 10, 2025**

**BETWEEN**

**KUMAR HARIA ASVIN ..... APPELLANT**

**AND**

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

**AND**

**M ORIENTAL BANK ..... INTERESTED PARTY**

**I&M BANK ..... INTERESTED PARTY**

**RULING**

**Introduction & Background:-**

1. On 26<sup>th</sup> April 2024, the Tax Appeals Tribunal issued judgment where the Respondent's ("the Commissioner") Objection Decision dated 27<sup>th</sup> July 2023 demanding Capital Gains Tax of Kshs.247,217,628.00/= from the Appellant was affirmed. The Appellant has evinced his intention to appeal this decision and in the meantime, filed the Notice of Motion dated 7<sup>th</sup> May 2024 made under Order 42 Rule 6(2) of the Civil Procedure Rules and section 1A, 1B & 3A of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) seeking to stay execution of the said judgment. The application is supported by the affidavit of the Appellant sworn on 7<sup>th</sup> May 2024 and opposed by the Commissioner through the replying affidavit of ILHAM ABDI sworn on 19<sup>th</sup> September 2024.
2. When the application came up for directions on 9<sup>th</sup> May 2024, the court issued temporary stay orders of execution, including staying the enforcement of the Agency Notices dated 2<sup>nd</sup> May 2024 that had been issued to the Appellant's bankers, including the 2<sup>nd</sup> Interested Party (I&M Bank) herein, pending hearing of the application. The Appellant has now also filed an application dated 24<sup>th</sup> July



2024 accusing the Managing Director of I&M Bank of contempt of these orders having frozen the Appellant's account despite service of the orders. This application has been responded to by the Commissioner through the replying affidavit of ILHAM ABDI sworn on 19<sup>th</sup> September 2024. The court directed that the applications be disposed by way written submissions, which are on record and I will make relevant references to them.

### **Analysis and Determination:-**

3. On the application for stay, the parties agree that in order for the Appellant to succeed, he has to satisfy the test set out under Order 42 Rule 6 (2) of the Civil Procedure Rules. He must demonstrate substantial loss may result unless the order of stay is made. He must also demonstrate that the application has been brought without undue delay and lastly, he must give such security as the court may order for the due performance of the decree or order as the case may be. All these conditions must be met and none is less worthy than the other (See Tuitott J., as he was then, in *Kenya Postel Directories Limited v Commissioner of Domestic Taxes* [2020] KEHC 4671 (KLR)). Our courts have recognized that the power to order stay is discretionary and must be exercised in such a way that the appeal is not rendered nugatory and this discretion, I would add, is based on the facts and circumstances of each case (see *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR)).
4. In arriving at a balance, the court is to weigh the Appellant's entitlement to exercise his statutory right of appeal; The Commissioner's entitlement to the fruits of its judgment, in this case to collect the taxes to be paid by the Appellant and; the court should ensure that the appeal is not rendered nugatory by imposing substantial loss on the Appellant rendering the appeal itself otiose (See *Keroche Breweries Limited v Commissioner of Domestic Taxes* [2020] KEHC 9627 (KLR)). The onus of satisfying the court that unless stay is granted, the intended appeal would be rendered nugatory, is upon the Applicant (See *David Morton Silverstein v Atsango Chesoni* [2002] KECA 287 (KLR))
5. On furnishing security, the Appellant is to demonstrate that his application is made in good faith and is not meant to deny the Commissioner the fruits of the judgment. It is the Court which determines the security upon ordering stay to ensure the due performance of the obligations by the Applicant as to costs and to satisfy the decree and it is therefore sufficient for the Appellant to depose that it is ready to provide security (See *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] KEHC 8358 (KLR)). In determining what security is sufficient, the court may be guided by previous comparable orders on the same. For example, in *Monaco Engineering Limited v Commissioner of Income Taxes* [2021] KEHC 9698 (KLR) the Applicant was ordered to furnish security of Kshs.20,000,000.00/= in a tax demand of Kshs.65,281,768.00/=. In *Bella Vista Restaurant Mombasa Limited v Kenya Revenue Authority* [2016] KEHC 4253 (KLR), the Court recognized the financial difficulties of the petitioner therein and declined to order security as it would have led to the closure of the petitioner's business. However, the Court of Appeal in *Coastal Bottlers Limited v Commissioner Of Domestic Taxes* [2009] KECA 190 (KLR) declined to grant stay after no relevant evidence was placed before the court such as a balance sheet of the Applicant, from which the court could come to the conclusion that if the Applicant was to be compelled to pay the outstanding tax balance, it might be forced out of business. In *CMA CGM (K) Limited v Commissioner of Domestic Taxes* [2020] KECA 766 (KLR), the Court of Appeal ordered the Appellant to deposit Kshs.50,000,000.00/= in a joint account pending the appeal where the sum demanded as taxes was Kshs.299,130.352.00/=.
6. With the above guiding principles in mind, I now turn to the Appellant's application to determine whether he has made out a case for stay of execution. He states that he has an arguable appeal, that no prejudice will be suffered by the Commissioner if the stay is granted, that the application has



been filed without unreasonable delay and that he is ready and willing to furnish a suitable security of bank guarantee as may be required and directed by the court. In response, the Commissioner has stated that if the court is inclined to grant a stay, then the Appellant should deposit security of 60% of the taxes due and a bank guarantee of the remaining 40%. Going through parties' pleadings and submissions, the cases I have cited above and balancing the interests of the parties, I am inclined to grant a stay of execution on condition that the Appellant deposits 50% of the demanded taxes, that is Kshs.123,608,814.00/= or in the alternative, provide a bank guarantee for the entire sum of taxes demanded, being Kshs.247,217,628.00/= from a reputable bank, within 90 days of the court's ruling.

7. Turning to the contempt application, the parties submit by urging the court to determine the effect of the stay orders on the subject Agency Notices. The Appellant states and submits that the Notices ought not to have been issued considering section 42(14) of the Tax Procedures Act (Chapter 469B of the Laws of Kenya) provides that the Commissioner shall not issue such a Notice unless the taxpayer has not appealed against an assessment. Thus, the Appellant submits that since there is an appeal, the subject Agency Notices are unenforceable. On its part, the Commissioner states that the effect of the court order was that the Notices were not lifted but rather implementation of the same was stayed pending hearing and determination of the application which was to preserve the funds in question so that neither of the parties can access the funds during that period. The Commissioner states that it has been complying with the said orders and has not taken any money in the Appellant's accounts domiciled in the Interested Parties' banks. Further, that the orders issued by the court on 9<sup>th</sup> May 2024 were in respect of I&M Bank and not M Oriental Bank which is a stranger to the stay orders.
8. The orders that were granted by the court were in respect of Prayer No. 2 of the Appellant's application which sought that "Pending the hearing and determination of this application the Honourable Court be pleaded to issue a stay of implementation and/or enforcement of the Respondent's Agency Notices dated 2<sup>nd</sup> May 2024 to the Applicant's Bankers being I&M and NCBA bank for the sum of Kshs.247,217,628.00/= " From the aforementioned prayer, it is clear that what the Appellant sought was the stay of implementation and/or enforcement of the Agency Notices and not the lifting of the same. The Notices were also directed to I&M Bank and NCBA Bank and such, I am inclined to agree with the Commissioner that the Agency Notices were not lifted and remained valid and what was stayed was the enforcement of the same. The orders were not directed to the 1<sup>st</sup> Interested Party who is a stranger to these proceedings. The record indicates that the Appellant's appeal was filed on 9<sup>th</sup> May 2024, after the said Agency Notices were issued, therefore, the Appellant cannot rely on section 42(14) of the Tax Procedures Act above to state that there was an appeal and therefore the Agency Notices were invalid.
9. As the Agency Notices remained valid as they were not lifted, can I&M Bank be cited for contempt for freezing the Appellant's access to the said account? I do not think so. I am persuaded by the decision of Wendoh J., in KANGIRI FARMERS CO-OPERATIVE SOCIETY LTD v COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT [2008] KEHC 1681 (KLR) where it was held that allowing a party to access funds that are the subject of an agency notice or releasing the said sums therein to the holder of the account would destroy the very substratum of the Agency Notice. The learned judge held as follows:-

Black's Law Dictionary 8th ED defines stay as "postponement or halting of a proceeding, judgment, or the like (2) an order to suspend all or part of a judicial proceedings or a judgment resulting from those proceedings."

Jowitt's Dictionary of English Law Vol 2 defines stay as a suspension of proceedings in an action or sometimes it means a total discontinuance of the action. In the instant case, the order of the court stayed the agency notice issued by the Respondent directed at the



Applicant's accounts held by the 2nd Interested Party. The applicants have interpreted the order to mean that the money held by the Bank could be released to them upon the agency notice being stayed. I do not believe that is a correct interpretation of that order. If the money were to be released to the Applicants it means the very substratum of the agency notice would have been destroyed. It would defeat the whole purpose of the agency notice and it would mean that the Judicial Review application is determined even before it is heard interpartes. This is because the Applicant would withdraw the money held by the 2nd Interested Party in which the 1st Interested Party has an interest as they wish and may deplete the account before the time the Judicial Review Application is heard interpartes and if any orders are given in favour of the Respondent, they would have been overtaken by events or defeated. That would be condemning one party unheard or offending the cardinal principles of natural justice that one should not be condemned unheard. Harlbury's Laws of England Vol. 9.1 465 states that for one to be punished for disobedience of a court's order the order must be clear and unambiguous.

In this case it seems the two sides interpreted the order of the court differently. In my considered view however, the order is clear and unambiguous that the Respondent was supposed to halt or stop any action towards the enforcement of the agency notice issued by the Respondent...

10. I therefore find that there was no disobedience of the court's orders of 9<sup>th</sup> May 2024 when the Bank froze the Appellant's accounts in respect of the Agency Notices and that neither party could have accessed the same pending the hearing and determination of the Appellant's application. That was the correct interpretation of the order and I&M Bank complied by not acting on the Agency Notices. No money could have been released to either the Commissioner or the Appellant. Therefore, the Appellant's application dated 24<sup>th</sup> July 2024 has no merit and it is hereby dismissed

#### **Conclusion and Disposition:-**

11. The court therefore makes the following orders:-
  1. The application dated July 24, 2024 is dismissed.
  2. I hereby grant stay pending the hearing and determination of the appeal on condition that the Appellant deposits in court 50% of the demanded taxes, that is Kshs.123,608,814.00/= or in the alternative, furnish the Respondent with a bank guarantee for the entire sum of taxes demanded, being Kshs.247,217,628.00/= from a reputable bank, within 90 days of the court's ruling, failure to which, the order of stay lapses.
  3. The Appellant shall bear costs of both applications.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10<sup>TH</sup> DAY OF MARCH 2025**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In The Presence Of

1. Ms. Mangla holding brief for Dr. Arwa for the Applicant.
2. Ms. Nyarigita holding brief for Ms. Naeku for the Respondent.



3. Amos - Court Assistant

