



REPUBLIC OF KENYA



**Aee Power Limited v Commissioner, Domestic Taxes (Income Tax Appeal E160 of 2023)
[2024] KEHC 1566 (KLR) (Commercial and Tax) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1566 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E160 OF 2023
FG MUGAMBI, J
FEBRUARY 16, 2024**

BETWEEN

AEE POWER LIMITED APPELLANT

AND

COMMISSIONER, DOMESTIC TAXES RESPONDENT

RULING

1. This ruling determines the application dated 13th October 2023, which is brought under section 3A of the *Civil Procedure Act*, 2010 and Order 42 rule 6 of the *Civil Procedure Rules*. The application seeks to stay the execution of the decision of the Tax Appeals Tribunal (TAT) as delivered on 6th October 2023 in TAT No. 259 of 2022 pending the hearing and determination of the appeal lodged in this Court. The application is supported by the affidavit and supplementary affidavit both sworn by Esther Majano, the Financial Controller of the applicant Company on 13th October and 16th November 2023 respectively. The applicant's written submissions are dated 17th November 2023.
2. The application is opposed vide a replying affidavit sworn by Victor Mino an officer of the respondent, on 31st October 2023.
3. The undisputed genesis of this appeal lies in the said TAT decision which partially allowed the applicant's appeal contesting the respondent's objection decision of Kshs. 150,768,993/=. The Tribunal upheld the respondent's tax assessment at Kshs. 84,748,352 with respect to VAT, income tax, and PAYE for the years 2016 to 2019, effectively nullifying the withholding tax assessment of Kshs. 66,020,641. Dissatisfied with the said decision, the applicant herein filed a Memorandum of Appeal dated 13th October 2023 and the present application.



Analysis

4. I have carefully considered the pleadings, submissions and authorities presented by the opposing parties in light of Order 42 rule 6(2) which provides that:

“No order for stay of execution shall be made under sub-rule (1) unless:

 - i. The Court is satisfied that substantial loss may result to the appellant unless the order is made and;
 - ii. That the application has been made without unreasonable delay; and
 - iii. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the appellant.”
5. Additionally, I draw upon the case of *Butt v Rent Restriction Tribunal*, (1982) KLR 417 in which the considerations that a court ought to consider in considering an application of this nature were further enunciated by the Court of Appeal. The court provided the following further pointers:
 - 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 unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 - v. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
6. It is observed that the application herein was promptly filed on 13th October 2023, six days after the Tribunal’s decision delivered on the 6th October 2023.
7. The applicant is apprehensive that should the application not be allowed, the respondent might proceed with the enforcement of the portion of the upheld tax assessment. This would occasion significant financial detriment upon the company, especially given the magnitude of the tax assessment and the company’s existing financial challenges. The applicant is further apprehensive about the potential difficulty of the respondent to reimburse any taxes found due to it in the event the appeal is successful.



8. The respondent refutes the claims made by the applicant and contends that the taxes, which are substantial, have remained unpaid since the 21st May, 2021, when the respondent issued its assessment. Furthermore, the respondent maintains that executing the Tribunal's judgment will not render the intended appeal nugatory and should the High Court decide in favor of the applicant, the respondent asserts that it possesses sufficient financial resources to reimburse the applicant.
9. It is now settled through judicial pronouncements that at this interlocutory stage, the court is only required to interrogate the pleadings, affidavits and submissions made by parties in order to determine whether there is an arguable case. An arguable case does not mean one that has to succeed on appeal, but one that raises serious questions to be presented at the appeal.
10. I have looked at the Memorandum of Appeal dated 16th October 2023. The issues that the applicant raises are not frivolous and it is desirable that the applicant is allowed to ventilate its appeal before this court to finality.
11. Regarding security, the applicant confirms that it is willing to furnish a reasonable security save that it is currently facing financial difficulties, noting that the applicant has yet another appeal against the respondent being ITA E165 of 2023, with additional taxes of Kshs. 859,632,528/= being demanded by the respondent from the applicant.
12. The applicant contends that demanding security in both instances, while fully aware of the financial hardships it is currently facing, would only deepen the company's financial crisis to an unparalleled degree, potentially leading to its shutdown. This outcome would be detrimental not only to the applicant but also to the respondent, as it would hinder future tax collection opportunities. Given these conditions, the applicant views the respondent's request for 60% of the tax amount as security to be excessive, as it would exacerbate the applicant's financial strain.
13. The respondent has not disputed the audited Financial Statements provided by the appellant, which were intended to demonstrate the company's financial difficulties. However, the court observes that these statements pertain solely to the year ending December 2020 and might not accurately represent the current financial status of the applicant company.
14. For example, the provided Statement of Profit or Loss and other Comprehensive Income shows a total comprehensive income of Kshs. 20,064,195/= for the year 2020, compared to Kshs. 2,862,510/= in 2019. A significant portion of the monies is also reflected under trade and receivables at that time. The court acknowledges that on page 20 of the report, the company's unfortunate performance was partly attributed to the COVID-19 pandemic, among other factors. However, the court concludes that the applicant has not presented adequate and up-to-date information on the company's financial status to assist the court in reaching a more informed decision.
15. The applicant prays that the court does approve security amounting to Kshs. 10,000,000/= in the form of a comfort letter. To substantiate this request, the applicant has submitted a letter from AEE Power SA dated 16th November 2023, signed by its Financial Controller. From my perspective, optimal security should be easily convertible to cash or enforceable without significant complications, to allow the judgment creditor to swiftly and effectively obtain the due amount should the appeal fail.
16. In the present case, there are no financial documents to back AEE Power SA's commitment, particularly any proof of its financial robustness. Therefore, the court finds this type of security unsatisfactory under the given conditions.



17. Alternatively, the applicant prays that the court allows the applicant to utilize 20% of its withholding tax credits totaling Kshs. 110,550,613/= as determined by the Tribunal in TAT No. 709 of 2022 to be applied towards security in both ITA E165 of 2023 and ITA E160 of 2023.
18. I have looked at the impugned judgment in TAT No 709 of 2022. It is clear that the appeal filed by the applicant therein was dismissed in toto and the respondent's objection decision of 13th June 2022 upheld, for Kshs. 859,632,528/=. In the circumstances the court is unable to comprehend the basis of the alleged resultant revenue arising from withholding tax credits as submitted by the applicant.
19. Finally, taking all these factors into account, I have considered the form and amount of security that would most appropriately balance the interests and conveniences of both parties, while the appeal is pending.

Determination

20. I hereby allow the application on condition that the applicant deposits with the respondent the amount of Kshs. 50,000,000/= within the next 30 days. In the event the applicant does not comply with these orders, the stay shall stand vacated and the respondent shall be at liberty to execute. The costs of this application shall await the outcome of the appeal.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16TH DAY OF FEBRUARY 2024.

F. MUGAMBI

JUDGE

