



Arcon Works Limited v Commissioner of Domestic Taxes (Miscellaneous Application E262 of 2024) [2024] KEHC 11795 (KLR) (Commercial and Tax) (4 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11795 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E262 OF 2024**

FG MUGAMBI, J

OCTOBER 4, 2024

BETWEEN

ARCON WORKS LIMITED APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

1. For determination is the application dated 29/5/2024, seeking review of the Orders issued by this court on 7/5/2024 requiring the applicant to deposit a security of Kshs. 10 Million shillings to the respondent pending the hearing and determination of the appeal. Instead, the applicant prays to be allowed to execute a bank guarantee of Kshs. 5,000,000/= as security pending the hearing and determination of the intended appeal.
2. The applicant contends that it is unable to comply with the said Orders due to financial constrains as they cannot access their bank accounts due to a notice to preserve funds issued by the respondent. The orders were issued following an application by the respondent in Kenya Revenue Authority V Equity Bank Limited, National Bank Ltd, Kenya Women Microfinance ltd, Arcon Works Ltd, Joyce Wanjiru Njoroge, Semion Karanja Maina & Joseph Maina Kimani, HC Comm Misc Appln No. E465 of 2023.
3. The applicant confirms that on 17/7/2023 parties entered into a consent which was adopted on 15/8/2023. It is because of these orders that the applicant is unable to comply with the court orders herein.
4. The application is opposed. The respondent notes that the security terms of Kshs. 10 Million being paid within 21 days was as a result of a consent that was recorded on 7/5/2024. As such, the application filed by the applicant was in effect an application to set aside the consent order. That being the case,



the respondent contends that the applicant had not proved that there were valid grounds for setting aside the consent orders and that inability to pay is not a ground for setting aside the consent.

5. In any case, the respondent further contends that the applicant had not met the requirements for review of this court's orders under Order 45. The respondent confirms that indeed there are preservation orders as stated by the applicant, but in an unrelated matter to this one.
6. At the time the consent in this matter was entered into, the applicant was well aware of the preservation orders in Misc E465 of 2023. The respondent therefore sees this as an afterthought by the applicant, tailored at delaying the determination of the appeal, which the respondent avers has been filed outside of the time directed by the court.
7. Regarding the suggested security, it is the respondent's contention that the bank guarantee of Kshs. 5 million against the disputed tax of Kshs. 37,666,450/= is unproportionate.

Analysis and determination

8. I have considered the pleadings, evidence and submissions made by the respondent herein. The applicant did not file any written submissions to the application. Be that as it may, I shall proceed to consider the application.
9. The applicant relies on an alleged consent between the parties on the terms of the security. A cursory look at the court record however shows that on 7/5/2024 this court invited the parties to negotiate the security terms with a view to compromising the application for stay of execution.
10. Ms Chelangat who was present for the respondents suggested that the applicant deposits half of the disputed tax amount. Ms Ndugire's offer was for a bank guarantee of Kshs. 1 million which was rejected by the respondents as being too low. Ms Ndugire on that day confirmed to the court that: "We are unable to come to an agreement. We [have] agreed to take the courts directions".
11. It was on this basis that this court issued a conditional order of stay of execution. The court also fixed the terms of security and ordered the applicant to deposit the amount of Kshs. 10 Million shillings. It is therefore not accurate to term the said orders as consent orders as they were not consented to by the parties but issued by the court of its own motion. As such, the grounds for setting aside a consent such as fraud, mistake, or misrepresentation, do not apply in this case, as submitted by the respondent.
12. The next issue is whether there is a basis for this court to otherwise review its orders. Order 45 of the Civil Procedure Rules allows a party to seek a review of a court's order on the grounds of:
 - a. Discovery of new and important evidence.
 - b. A mistake or error apparent on the face of the record.
 - c. Any other sufficient reason.
13. The applicant must demonstrate a reason within these parameters that justifies a review of the court's orders. While the directions of 7/5/2024 were indeed issued by the court and not based on a consent order, the applicant contends that the financial constraints arising from the preservation orders issued in Misc. E465 of 2023 constitute a significant and unforeseen change in their financial circumstances.
14. Having held that the directions of 7/5/2024 were directions issued by the court and not a consent order, it is immaterial that the applicants were aware of the preservation orders in Misc. E465 of 2023 at the time. The court gave its directions suo moto and the applicants were bound to comply. That would have been different if the said order was a consent order.



15. In my view the applicant's ground for review is plausible that although the applicant was aware of these preservation orders at the time, which effectively freeze its bank accounts, the full impact of these orders on the applicant's ability to comply with the court's directions may not have been fully appreciated or brought to the court's attention.
16. The respondent does not deny the existence of these preservation orders but argues that they are unrelated to the matter at hand. However, the financial constraints resulting from these orders clearly have a direct impact on the applicant's ability to comply with this court's orders and therefore merit consideration.
17. The overriding objective of the court is to dispense justice equitably. The applicant's inability to comply with the court's order due to factors beyond their control, such as the preservation orders, raises a significant issue of fairness. If the orders are not reviewed, the applicant would face an undue hardship that would affect its right to be heard.
18. I note that while the applicant initially proposed a bank guarantee of Kshs. 1 million, which was rejected by the respondent, the current proposal of a Kshs. 5 million bank guarantee may be interpreted as a show of good faith. This proposal, although lower than the initial Kshs. 10 million cash deposit, still offers a reasonable security amount and reflects the applicant's genuine effort to comply with the court's order to the best of their financial ability.
19. The court must weigh the proportionality of the security against the need to ensure the respondent's interests are adequately protected while also considering the applicant's financial limitations. I do therefore find that it would be just and equitable for this court to review its orders. I further find that sufficient reason has been given to warrant this court accepting the applicant's proposal to substitute the Kshs. 10 million cash deposit with a Kshs. 5 million bank guarantee as security pending the determination of the appeal.
20. In any case, a bank guarantee is treated as equivalent to a cash deposit because it provides liquidity and represents a firm commitment by the bank to pay the guaranteed amount on demand, subject to the terms of the guarantee. The respondent will therefore not be prejudiced.
21. Regarding the averment that the appeal has been filed out of time, it is worth noting that the power to extend time is a discretionary one vested in this court. As previously observed, the appellants have adequately explained their situation and provided a reasonable proposal regarding the deposit of security. I am satisfied that they are genuinely intent on pursuing their appeal. I will not deprive them of the opportunity to be heard, especially considering that no prejudice will be occasioned to the respondents, as security will have been provided.

Disposition

22. Accordingly, the application dated 29/5/2024 is allowed. The conditional orders for stay of execution issued on 7/5/2024 are hereby set aside and substituted with an order for stay of execution on condition that the applicant issues a bank guarantee of Kshs. 5million to the respondent within 30 days from the date of this Ruling in default of which the appeal shall stand dismissed. Parties shall take directions to ensure that the appeal is filed and heard at the earliest.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 4TH DAY OF OCTOBER 2024.

F. MUGAMBI

JUDGE

