



Harvway Limited v Commissioner of Domestic Taxes (Miscellaneous Civil Application E011 of 2022) [2023] KEHC 1629 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1629 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
MISCELLANEOUS CIVIL APPLICATION E011 OF 2022**

FN MUCHEMI, J

MARCH 9, 2023

BETWEEN

HARVWAY LIMITED APPLICANT

AND

THE COMMISSIONER OF DOMESTIC TAXES RESPONDENT

RULING

Brief Facts

1. The application dated April 26, 2022 brought under Order 42 Rule 6(6) and Order 51 Rule 1 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act*, Section 32 of the *Tax Appeals Tribunal Act*, Rule 4 of the *Tax Appeals Tribunal (Appeals to the High Court Rules)*, 2015, Section 53 & 55 of the *Tax Procedures Act* and Article 159(2) of the *Constitution of Kenya* seeks for orders of stay pending appeal lodged against the orders made on March 4, 2022 by the Tax Appeal Tribunal dismissing an application for enlargement of time. The applicant also seeks for orders of leave to lodge an appeal out of time against the said ruling and order in the Tax Appeals Tribunal Miscellaneous Application No. 118 of 2021 delivered on March 4, 2022. The applicant seeks to have the matter referred to the respondent's Alternative Dispute Resolution department for an amicable settlement
2. The respondent filed a replying affidavit sworn on May 25, 2022 in opposition to the application.

Applicant's Case

3. The application is supported by the affidavit of Titus Kibui Kariuki, a director of the applicant and he stated that the Honourable Tax Appeals Tribunal delivered its ruling on March 4, 2022, dismissing his application for enlargement of time. Without any notice to the applicant, the respondent issued an Agency Notice on March 10, 2022 against it directing Kenya Commercial Bank Limited to recover a sum of Kshs. 2,116,850/- whose net effect is to freeze the operations of its trading activities by denying it access to its operating and working capital.



4. The applicant deposes that on April 13, 2022, he went to Kenya Commercial Bank, Nyeri Branch to undertake routine transactions when he found that the accounts had been frozen. He averred that he was further informed by the branch Manager that Kenya Revenue Authority was demanding taxes from the applicant.
5. The applicant contends that the agency notice has caused it heavy losses as its principal bank accounts have been frozen and it can therefore not service loans or pay suppliers.
6. The applicant avers that he intends to appeal against the said ruling and order in Tax Appeals Tribunal Miscellaneous Application No. 118 of 2021 delivered on March 4, 2022 out of time. He further avers that their intended appeal raises pertinent issues of fact and law that demonstrate an arguable appeal which has high chances of success.
7. The applicant deposes that the delay in filing the instant application is not unreasonable or undue and the same is not explicable. Further he argues that the balance of convenience tilts their favour as no prejudice shall be suffered by the respondent if the court grants the orders sought. The applicant further avers that unless the orders sought are granted, it shall be rendered impecunious causing substantial loss and thus rendering the intended appeal nugatory. Moreover, should the respondent proceed with the enforcement of the agency notice, the applicant contends that they stand to suffer irreparable harm that cannot be compensated by way of damages.

The Respondent's Case

8. The respondent states that the applicant is running construction business and on November 10, 2019, it received auto generated VAT assessments demanding the principal taxes of Kshs. 2,116,849/-. The basis of the assessments was because of cross validation of data from invoice declarations made in buyer's VAT returns with those made in the corresponding seller's (supplier's) return. The unmatched invoices claimed in the original VAT return periods of April and May 2018 were disallowed giving rise to additional assessments issued on December 10, 2019.
9. The respondent avers that the applicant objected to the additional assessment on December 10, 2019, but the said objection was rejected and the assessment confirmed on January 7, 2020. Consequently, the applicant filed an application dated October 26, 2021 at the Tax Appeals Tribunal seeking leave to file the appeal out of time. The tribunal delivered its ruling on March 4, 2022 dismissing the application on the grounds that the applicant did not show sufficient reasons why it delayed in filing an appeal against the tribunal ruling.
10. The respondent contends that the application is fatally defective and ought to be struck out for offending Section 32 of the *Tax Tribunals Act*. The respondent further contends that the applicant is a perennial defaulter who never complies with timelines provided by the statute. Moreover, the respondent deposes that pursuant to Section 51 of the *Tax Procedures Act*, it considered the applicant's objection before issuing an agency notice and the agency notices issued were in compliance with Section 42 of the *Tax Procedures Act* 2015 and thus are legal and regular.
11. The respondent argues that the applicant has not satisfied the orders for grant of stay as it has failed to demonstrate the existence of a prima facie arguable appeal. Furthermore, the instant application was not filed expeditiously within the statutory timelines. The respondent further argues that granting of the orders would be prejudicial to it as the applicant is guilty of laches.
12. The respondent states that the applicant has not advanced any reasons to justify the delay and failure to comply with Section 32 of the *Tax Appeals Tribunal Act* which necessitates that an appeal to the High Court be filed within 30 days of receipt of the decision. No reasonable cause for the delay has been



- demonstrated nor the existence of extenuating circumstances to warrant for an order of enlargement of time to file an appeal to the High Court to warrant the exercise of discretion in favour of the applicant.
13. The respondent avers that the applicant is guilty of proliferated litigation in a bid to prevent them from recovering the taxes due thus causing the respondent to suffer prejudice since their ability to recover and collect taxes owing will be inhibited. The respondent contends that the application is devoid of merit, misconceived, fatally defective and is a gross abuse of the court process and ought to be struck out with costs.
 14. Parties hereby disposed of the application by way of written submissions.

The Applicant's Submissions

15. The applicant relies on Order 42 Rule 6 of the *Civil Procedure Rules* and the cases of *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others* and *Stephen Wanjohi v central Glass Industries Ltd Nairobi* HCCC No. 6726 of 1991 and submits that it has met the requirements for stay of execution pending appeal.
16. The applicant further relies on the case of *James Wangalwa & Another v Agnes Naliaka* [2012] eKLR and submits that it stands to suffer substantial loss as the agency notice to KCB has frozen all of its trading activities and operations by denying it access to working capital. Furthermore, the applicant contends that it cannot service its loans nor pay its suppliers due to the agency notice. In addition to the substantial loss, the applicant submits that the respondent is claiming a sum of Kshs. 2,116,850/-. Moreover, the applicant relies on the case of *National Industrial Credit Bank Limited v Aquinas Francis Wasike & Another* (UR) CA 238/2005 and contends that the respondent has not shown that it has means to repay or compensate the applicant in the event the appeal is successful. The applicant further submits that the irreparable loss cannot be compensated by way of costs
17. The applicant states that it is ready to abide by any terms or conditions given by the court on security of costs. To support its contentions, the applicant relies on the case of *Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another* [2018] eKLR.
18. The applicant submits that the Tax Appeals Tribunal rendered its decision on March 4, 2022 and the instant application was filed on April 26, 2022, which is less than two (2) months after the delivery of the ruling. The applicant further submits that the 30 days expired on April 14, 2022, and thus the instant application was filed 8 days upon expiration of the time contemplated under Section 32(2) of the *Tax Appeal Tribunal Act*. The applicant further urges the court to be guided by Article 159 of the *Constitution* and find that the application has been brought without undue delay and exercise its discretion in its favour. In any event, the applicant contends that the respondent has not demonstrated any prejudice that it shall suffer if the orders sought are granted.
19. The applicant refers to the case of *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd & 2 Others*, Civil Application No. 124 of 2008 and submits that its intended appeal raises arguable points of appeal particularly that the tribunal did not consider the submissions and evidence supplied by the applicant thus occasioning an error in law. Further, the applicant argues that the tribunal failed in finding that it did not supply any reasonable grounds to allow an extension of time to lodge an appeal out of time.
20. The applicant submits that the respondent has not shown any prejudice it stands to suffer should the matter be referred to arbitration. The applicant urges the court to be guided by Article 159 of the Constitution and refer the matter for arbitration.



The Respondent's Submissions

21. The respondent refers to the case of *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd & 2 Others*, Civil Application No. 124 of 2008 and submits that the intended appeal is frivolous and would lead to the eventual waste of the Honourable court's time. The respondent further argues that upon scrutiny of the memorandum of appeal, it does not show any grounds capable of being argued. The applicant has not provided any plausible grounds of either facts or law which would overturn the original verdict. Particularly, on ground 1, the respondent argues that the applicant failed to outline the alleged wrong provisions of law relied upon by the tribunal in delivery of its ruling. Further, on ground 2, the respondent submits that the applicant has not demonstrated the reasons for failure to file the appeal within time and further the applicant failed to outline the provision of law disregarded by the Honourable tribunal to arrive at a decision which was harsh and manifestly excessive.
22. The respondent relies on the cases of *Cleophas Wasike v Mucha Swala* [1984] eKLR; *Mwangi v Kenya Airways* as cited in *APA Insurance Limited v Michael Kinyanjui Muturi* [2016] eKLR and *Nicholas Kiptoo Arap Korir Salat v The IEBC & 7 Others* [2014] eKLR and submits that the applicant has not satisfied the conditions for it to be granted leave to appeal out of time. Furthermore, the respondent contends that the application and the intended appeal is defective for being time barred pursuant to the statutory timelines contemplated under Section 53 of the *Tax Procedure Act* which is buttressed in Section 32(1) of the *Tax Appeals Tribunal Act*. The respondent argues that the tribunal delivered its ruling on 4th March 2022 and the instant application was file on April 26, 2022, which is three (3) weeks evidently out of time.
23. The respondent argues that the applicant has failed to advance any reasons to justify the delay or failure to comply with Section 32 of the *Tax Appeals Tribunal Act* and that the applicant failed to demonstrate a reasonable cause of its failure to appeal within the statutory timelines. The respondent further contends that the applicant has failed to demonstrate the existence of extenuating circumstances to warrant an order for enlargement of time to file an appeal or to warrant exercise of the court's discretion in its favour. Moreover, the respondent submits that it shall suffer prejudice should the application be granted since its ability to recover and collect due taxes would be inhibited noting that the enforcement measures by way of agency notices are already in motion.
24. The respondent relies on Order 42 Rule 6 of the *Civil Procedure Rules*, and the cases of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR; *Shell Limited v Kibiru & Another* [1986] KLR 410 and *Butt v Rent Restriction Tribunal* (1979) eKLR and submits that the applicant has not met the threshold for stay of execution pending appeal. The respondent further submits that the applicant has failed to demonstrate substantial loss likely to be suffered and further the hardship it stands to suffer in recovering the said sum which would render their appeal nugatory. The respondent further argues that there has been unreasonable delay in bringing the application which is more than one month later and that there is no prima facie arguable appeal set out by the applicant.
25. The respondent contends that at all material times, they complied with the law before issuing the agency notice dated March 10, 2022. The respondent further submits that they complied with Sections 42 and 51 of the *Tax Procedure Act* and issued the agency notice after the tribunal delivered its ruling. To support its contentions, the respondent relies on the case of *Choppies Enterprises Limited v Commissioner of Domestic Taxes* [2020] eKLR and submits that the agency notice is legal and was issued in accordance with the law.



Analysis & Determination

Whether the court should exercise its discretion to grant the applicant leave to file its appeal out of time;

26. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated *inter alia* that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.”

27. Similarly in the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:

“... it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

28. Section 32 of the *Tax Appeals Tribunal Act* provides:-

A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.

29. Section 53 of the *Tax Procedures Act* 2015 provides:-

A party to proceedings before the Tribunal who is dissatisfied with the decision of the Tribunal in relation to an appealable decision may, within thirty days of being notified of the decision or within such further period as the High Court may allow, appeal the decision



of the high Court in accordance with the provisions of the [Tax Appeals Tribunal Act, 2013](#) (No. 40 of 2013).

30. Rule 4 of the [Tax Appeals Tribunal \(Appeals to the High Court\) Rules, 2015](#) provide:-

The Court may extend time specified in Rule 3 if the Court is satisfied that, owing to absence from Kenya, sickness, or other reasonable cause, the appellant was unable to file the memorandum of appeal within that period and that there has been no unreasonable delay on the part of the appellant.

31. Applying the above principles to the instant case, the applicant through its director did not state that he was absent from Kenya or that he was sick. Thus the only ground left to be relied on is "other reasonable cause." The reasons availed by the applicant for failure to file the appeal in the specified time was that a ruling was delivered on March 4, 2022. The respondent did not serve the applicant with any notice and on March 10, 2022, it issued an agency notice to Kenya Commercial Bank freezing all the applicant's operations of its trading activities by denying it access to its operating and working capital. The applicant through its director, further explained that on April 13, 2022, he went to the said bank to undertake routine transactions, and that is when he learnt that the accounts had been frozen. The applicant filed its application on April 26, 2022 which is a duration of 1 month 22 days from the date of the ruling. It is my considered view that the length of delay of 1 month 22 days is not inordinate considering the explanation given by the applicant that he did not receive any notice and only came to learn of the decision of the tribunal on April 13, 2022 when he went to KCB to undertake routine transactions. This court finds that there is a reasonable and satisfactory explanation for the delay.

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

32. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) [Civil Procedure Rules](#). Order 42 Rule 6 of the [Civil Procedure Rules](#) stipulates:-

- “ 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
2. No order for stay of execution shall be made under sub rule 1 unless:-
 - a. The Court is satisfied that substantial loss may result to the 1st Applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. 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 Applicant.”



33. Thus under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an applicant should satisfy the court that:
1. Substantial loss may result to him/her unless the order is made;
 2. That the application has been made without unreasonable delay; and
 3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

34. Substantial loss was clearly explained in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR:-

“No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. 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...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

35. The applicant contends that it stands to suffer substantial loss as its accounts are frozen rendering all its trading activities inoperable and that it is not able to service its various loans or pay its suppliers. The applicant further argues that the respondent has not shown it has the financial capability to repay and compensate for its losses in the event the appeal is successful. The respondent argues that the applicant has not demonstrated that substantial loss will be suffered nor has the applicant demonstrated that it shall go through hardship in recovering the said sum, which would render the appeal nugatory. Upon perusal of the grounds on the body of the application as well as the supporting affidavit, the applicant has deponed that its bank accounts were all frozen upon the issue of the agency notice and that this act of the respondent has paralysed its operations. The applicant depends on the funds deposited in the said accounts and has been grounded due to the freeze. The applicant has, in my view, demonstrated that it is likely to suffer substantial loss in its business in the event that the orders are not granted.
36. On the issue of security of costs, the applicant did not offer any security in its affidavit but expressed its willingness to abide by any orders of security in its submissions. It is therefore paramount for the court to balance the interests of the parties, a successful party who wants to enjoy the fruits of the litigation and the dissatisfied litigant who prefers an appeal against a judgment. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:-

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”



37. Upon considering all the above factors, the law and caselaw, I am of the view that this application has passed the test set out under Order 42 Rule 6. I find it merited and allow it accordingly in the following terms:-
- a. That orders for stay of execution of the Tax Tribunal Ruling delivered on March 4, 2022 are hereby granted on condition that the Applicant deposits security of Kshs.500,000/= in an interest earning account in the names of the advocates on record for the parties within 30 days.
 - b. That in default of the deposit within the period given, the orders for stay will automatically be vacated.
 - c. That costs of this application shall abide in the appeal.

38. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 9TH DAY OF MARCH, 2023.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS 9TH DAY OF MARCH, 2023

