



**Commissioner of Domestic Taxes v Kenya Breweries Limited (Income Tax Appeal E026 of 2023)
[2023] KEHC 22496 (KLR) (Commercial and Tax) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22496 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E026 OF 2023
FG MUGAMBI, J
SEPTEMBER 22, 2023**

BETWEEN

COMMISSIONER OF DOMESTIC TAXES APPELLANT

AND

KENYA BREWERIES LIMITED RESPONDENT

RULING

1. The interlocutory appeal before me is filed against the decision of the Tax Appeals Tribunal (The Tribunal) dated January 20, 2023, allowing the respondent's application of July 18, 2022. The effect of this is that the respondent was granted leave to adduce new documents to be considered by the Tribunal during the hearing of the respondent's appeal.
2. Aggrieved with this decision the appellant filed the present appeal against the impugned ruling. Simultaneously with the appeal the appellant filed the application dated March 9, 2023. The application is brought under article 165(6) and (7) of the *Constitution of Kenya, 2010*, rules 17 and 20 of the *Tax Appeals Tribunal (Appeals to the High Court Rules) 2015*, section 1A 1B and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 42 Rule 6 of the *Civil Procedure Rules, 2010*.
3. It seeks orders of stay of proceedings and stay of execution of the Tribunal's ruling of January 27, 2023 and consequential orders in Nairobi TAT Appeal No 706 of 2021.
4. The application was premised on the grounds on the face of it, the supporting affidavit sworn by Michael Kasingiu and submissions dated April 14, 2023.
5. The applicant's case is premised on the prejudice that will be occasioned to the appellant. Counsel submitted that the new documents had not been considered during the review of the objection and therefore did not inform the objection decision. It was contended that the introduction of new



documents meant that the respondent was lodging a new objection against the appellant's assessment and the documents had the effect of either increasing or reducing the amounts in the assessment. This would prejudice the appellant's statutory power under section 51 of the [Tax Procedures Act](#) to review the documents.

6. The appellant confirmed that it was currently verifying the documents through its International Exchange of Information Office and the same needed a considerable amount of time. It was stated that the appellant was apprehensive that it would not be awarded a fair hearing and an opportunity to prepare for the hearing and thus suffer prejudice.
7. The appellant also refuted the respondent's assertions that this Honourable Court lacked jurisdiction to hear and determine the present appeal. The appellant cited section 32 (1) of the [Tax Appeals Tribunal Act](#) (TATA) which provides for appeals to the High Court from decisions of the Tribunal. The appellant submitted that the ruling dated February 27, 2023 was a decision of the tribunal by virtue of section 32 (1) and therefore appealable to the High Court on matters of law and fact.
8. Counsel submitted that its appeal, which was arguable, would be rendered nugatory if the orders sought in the application are not granted. Finally, Counsel submitted that the appeal was brought without undue delay.
9. The application was opposed by the respondent in its replying affidavit sworn by Karen Mate Gitonga on March 30, 2023 and written submissions dated May 2, 2023. The respondent argued that the documents that it sought to introduce were documents that were not in its custody before the objection decision was issued by the appellant.
10. The documents were held by Commissioner of Customs and Boarder Control, the Uganda Revenue Authority or the South Sudanese Authorities and efforts to obtain them were futile as the appellant had not provided any assistance to the respondent. In any case, the respondent argued that the respondent also had been granted similar leave to put in responses to the additional documents and as such would not be prejudiced. It was submitted that the timelines given by the Tribunal were sufficient as the appellant had already complied by filing its Supplementary Statement of Facts dated February 17, 2023.
11. The respondent observed that the application did not meet the threshold for interlocutory stay having not met the conditions for grant of stay of execution under order 42 of the [Civil Procedure Rules](#).

Analysis

12. I have carefully considered the pleadings, rival submissions and the authorities relied on by Counsel. The jurisdiction of this Court to hear this interlocutory appeal is in dispute. This is the first question that I must therefore deal with for if the Court were to find that it is devoid of such jurisdiction, the only option open to me would be to down my tools. (See [Owners of the Motor Vessel "Lillian S" V Caltex Oil \(Kenya\) Ltd.](#) Court of Appeal, at Mombasa. November 17, 1989).
13. Section 32(1) of the [TATA](#) provides that:

“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. (emphasis mine).
14. While the [TATA](#) does not define a proceeding or a decision within the context of the Act, I agree with the appellant that if the legislature intended to limit the power of appeals to the High Court to exclude interlocutory appeals, nothing would have been easier than to state as such. This reasoning is in tandem



with the jurisdiction bestowed on the High Court under article 165(6) of the Constitution to supervise subordinate courts and any person exercising judicial and quasi-judicial authority.

15. The jurisdiction of the Court to hear interlocutory appeals is further confirmed by rule 20 of the TATA (Appeals to the High Court) Rules, 2015 which permits this Court to apply the provisions of the Civil Procedure Rules 2010.

16. On that note and having confirmed that I have the jurisdiction to proceed, Order 42 rule 6(2) of the Civil Procedure Rules provides for the requirements to be met in an application for stay of execution. It provides as follows:

“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 plaintiffs 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 plaintiffs.”

17. The Court of Appeal has additionally rendered itself on the exercise of the discretion in such cases. In the case of Butt V Rent Restriction Tribunal, [1982] KLR 417 the Court stated thus:

“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.

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.

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 plaintiffs at the end of the proceedings.

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.”

18. An order for stay of execution is granted for purposes of preserving the substance of the dispute, to ensure that the rights of parties are balanced and that none of the parties suffers loss pending the appeal. In the case of Absalom Dova V Tarbo Transporters, [2013] eKLR the Court stated as follows:

“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. The court in balancing the two competing rights focuses on their reconciliation...”

19. Against this background, the respondent argues that this is a negative order and incapable of being granted. The respondent further confirms that both parties had in fact already complied with the



- orders of the Tribunal contained in the ruling of January 20, 2023. On its part the respondent had filed the additional evidence by way of a Supplementary Affidavit and the applicant had also filed its Supplementary Statement of Facts dated February 17, 2023.
20. These averments have not been controverted by the applicant. I am therefore inclined to find that the application for stay of execution is overtaken by events and cannot therefore be granted as there is no action that is capable of being stayed. Granting such an order would be an exercise in futility.
21. The applicant has also moved the court seeking stay of the proceedings pending the hearing and determination of the appeal. I concur with the holding of the Court (Gikonyo, J), in *Kenya Wildlife Service V James Mutembei*, (2019) eKLR, that:
- “Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.
22. That test of stay of proceedings was laid down by the Court of Appeal in *Standard Limited & 2 Others V Wilson Kalya & Another t/a Kalya & Company Advocates*, [2002] eKLR. To succeed, an applicant must demonstrate two things to the satisfaction of the Court:
- i. That the appeal which they have filed or which they intend to file is an arguable one, that is, that such appeal is not or will not be a frivolous one; and
 - ii. That unless the order for stay of proceedings sought is granted, their appeal or intended appeal, if it were to succeed would be rendered nugatory.
23. On arguability of the appeal, I am conscious of what entails an arguable appeal as held by the Court of Appeal in *Zacharia Kamau Mwangi V Esther Wanjiru Mwangi & 2 Others*, [2021] eKLR. That is:
- “... an arguable appeal need not be one that must necessarily succeed, but one that also warrants the Court’s interrogation” and “a single bona fide arguable ground of appeal is sufficient to satisfy this requirement.”
24. I have perused the Memorandum of Appeal and I find that the appellant has an arguable appeal that ought to be substantively considered and determined on its merits. The introduction of the documents that were not in the possession of the parties at the time of issuing the objective decision have the potential to substantially alter the proceedings before the Tribunal depending on the final decision in the appeal.
25. If the Tribunal were to proceed with the hearing and determination of the matter relying on the new documents and this Court’s decision overturns the ruling granting leave to file the documents, the Tribunal risks arriving at an erroneous decision. Granting an application for stay of proceedings pending the hearing and determination of the appeal far outweighs the judicial time and resources that stand to be lost in such an eventuality. This also means that if the application is not granted the appeal will be rendered nugatory.
26. For these reasons, I find that this is a proper case for granting stay of proceedings pending the outcome of the appeal.



Determination

27. The upshot of this is that the application partly succeeds and is hereby granted in terms of prayer 5 in the following terms:
- i. An order of stay of the Honourable Tribunal's hearing and proceedings in Tax Appeal No 706 of 2021 be and is hereby granted pending the hearing and determination of the appeal. The appeal shall be set down for hearing on priority basis.
 - ii. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 22ND DAY OF SEPTEMBER 2023.

F. MUGAMBI

JUDGE

Delivered in presence of:

Mr. Ngetich h/b for Ms. Patricia for the appellant

Ms Onyango for the respondent

Court Assistant: Ms. Carolyne Kyalo

ITA E026 OF 2023 RULING Page 20

