



Corporate Business Forms Limited v Kenya Revenue Authority (Income Tax Appeal E001 of 2022) [2022] KEHC 55 (KLR) (Commercial and Tax) (4 February 2022) (Ruling)

Neutral citation: [2022] KEHC 55 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E001 OF 2022**

EC MWITA, J

FEBRUARY 4, 2022

BETWEEN

CORPORATE BUSINESS FORMS LIMITED APPLICANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

RULING

1. On 7th January 2022, the Appellant took out a motion on notice brought under section 53 of the *Tax Procedures Act*; section 3A of the *Civil Procedure Act* and Orders 42 rules 6 and 51 rule 1 of the *Civil Procedure Rules* seeking two orders, namely; lifting the Respondent Agency Notices dated 14th December 2021 issued placed on the Applicant's bank account Nos. 001143696910800 and 147024416144 held at Equity Bank Green Span Mall and Kilimani Branches respectively; and stay of execution of the judgment of the Tax Appeals Tribunal (TAT) dated 19th November 2021, pending the hearing and determination of this appeal.
2. The Application is supported by the grounds on the face of the motion and the affidavit of Joseah Kogo sworn on 7th January 2022. According the grounds and the affidavit, the Applicant's grievance is that whereas the TAT issued its judgment on 19th November 2021, and the law allows the Applicant thirty (30) day's right of appeal, the Respondent initiated enforcement of the judgment by issuing agency notices dated 14th December 2021 on the Applicant's bank accounts prior to expiry of the time of appeal.
3. The Applicant asserts that the agency notices were issued without notice to it as contemplated under section 42 of the *Tax Procedures Act*, thus causing it embarrassment by bringing its business to a standstill. It states that the premature enforcement of the judgment and decree of the TAT will render the appeal nugatory.



4. It is the Applicant's case that it is in a position to pay the decretal amount should this court dismiss the appeal. It therefore asserts that it is fair and just that the orders it seeks be grant.
5. The Respondent has filed grounds of opposition dated 18th January 2022 opposing the Application. It contends that stay of execution is not automatic and the court should balance rights and interests of both parties. In that regard, the Respondent urges that the Applicant should provide security. It cites the decision in *Monaco Engineering Limited v Commissioner of Domestic Taxes [2021] eKLR* where the court ordered the appellant to deposit Kshs. 20,000,000 in disputed taxes of around Kshs. 65,000,000.
6. The Respondent argues that under Order 42 of the Civil Procedure Rules, the court may require an applicant to furnish security. "The respondent is in a position to refund the amount should the appeal succeed." It contends.
7. Counsel for the parties have addressed the court on their respective clients' positions on the Application. Going first, Mr. Mbaye, learned counsel for the Applicant, argues that the Respondent's notices were issued in contravention of the law (section 53) which allows a party thirty (30) days right of appeal.
8. He argues that the Respondent issued letter dated 30th November 2021 indicating less amount of tax of Kshs. 6,158,000, yet it issued agency notices for Kshs. 9,600,000. He states that the amount due is Kshs. 6,158,000 less expenses that are yet to be agreed and not Kshs. 9,600,000 in the agency notices.
9. Regarding security, he asserts that security is not mandatory. However, if the court is inclined to order security, the Applicant is willing to furnish a bank guarantee of Kshs. 500,000.
10. Miss Mambo, learned counsel for the Respondent on her part argues that section 53 of the [Tax Procedures Act](#) does not grant automatic stay of execution as the Applicant contends. According to counsel, the section only provides the period within which a party may lodge an appeal to this court. An aggrieved tax payer should approach this court under Order 42 rule 6 of the Civil Procedure Rules for stay of execution. The Applicant cannot fault the Respondent for enforcing the judgment granted in its favour by the TAT. It is her case that the submission that the Respondent properly proceeded in terms of section 42 of the [Tax Procedures Act](#) and issued agency notices.
11. Regarding the amount in the agency notices, she states that there is a lawful judgment issued by TAT for Kshs. 9,600,000 which is the only judgment the Respondent could enforce and did enforce.
12. On the letter dated 30th November 2021, she argues that the letter came after the fact and could not change the amount in the judgment of TAT. In any event, she contends, the letter clearly showed that the amount quoted therein had not been agreed. There is a decision binding on the parties and parties can only deal with it and not any other decision.
13. Miss Mambo urged that should the court be inclined to order stay of execution, it should order the Applicant to deposit 50% of the decretal amount being Kshs. 4,500,000 with the respondent. She otherwise prays that the Application be dismissed with costs.
14. I have considered the Application, the Response, Submissions made on behalf of the parties and the decisions relied on. This is an Application for stay of execution pending Appeal. The Applicant has argued that the Respondent moved prematurely to execute judgment issued in its favour by the TAT on 19th November 2021. It maintains that the Respondent issued agency notices prematurely and as a result, embarrassed it and brought its business to a halt. The Applicant also argues that the amount the Respondent is executing for is not correct since its letter of 30th November 2021 showed that the amount was about Kshs. 6,500,000.



15. The Respondent on its part argues that there is no automatic stay of execution; that the Respondent properly proceeded to execute and that there is no dispute on the tax amount allowed in the judgment of the TAT.
16. The Applicant argues that the Respondent's move to execute was premature and relies on section 53 of the *Tax Procedures Act*. I do not think the Applicant is right on this argument, and this is why. Section 53 provides for the time within which a party aggrieved with the Decision of the TAT may appeal to this Court. It states:

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 time as the High Court may allow, appeal the decision to the High Court in accordance with the provisions of the Tax Appeals Tribunal.
17. A plain reading of this provision shows that a party has a right to appeal within thirty days of being notified of the decision of the TAT. The time for appeal begins to run once the party is notified of the decision by the TAT or as the High may allow. The section does not state that the decision of the TAT will not be executed until expiry of the thirty days' window provided for appeal. The Applicant's reliance on this provision to argue that execution was premature cannot, therefore, be correct.
18. Turning to the *Tax Appeals Tribunal Act*, section 29(5) provides that the TAT shall cause a copy of its decision including the reasons for the decision, to be served on each party to the proceedings. Subsection (6) which is material to the issue at hand, states that:

Subject to (5), the decision of the Tribunal shall come into operation on the date the notice of the decision is given or on such other date as may be specified by the Tribunal in the notice.
19. It is clear from this provision of the law that a decision of the TAT, in this case the impugned decision, takes effect on the date parties are notified or as the TAT may decide. The Applicant has not argued that it was not notified of the decision. Indeed, it filed a Notice of Appeal on 17th December 2021 signifying that it was aware of the decision. The Applicant has also not argued that the TAT specified any other date as the date the decision would come into operation. In that respect, the decision of the TAT took effect on the date of notification which is not an issue in controversy here. This again shoots down the Applicant's argument that the Respondent prematurely moved to execute the decision of the TAT.
20. Turning to stay of execution, applications for stay of execution pending appeal are governed by Order 42 Rule 6. Rule 6(1) is clear that an appeal or second appeal does not operate as a stay of execution or proceedings under a decree or order appealed from. However, the court appealed from or the court appealed to, may for sufficient cause order stay of execution of such decree or order.
21. Rule 6(2) states that:

No order of stay shall be made under sub rule (1) unless-

 - a. The court is satisfied that substantial loss may result to the applicant unless the order is made and 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.



22. It follows that whether or not to grant stay of execution under order 42 rule 6(2), is an exercise of discretion. This discretion must be exercised judiciously. (*Francis Ndahebwa Twal v Ben Nganyi [2018] eKLR*).
23. In *Butt v Rent Restriction Tribunal [1982] eKLR*, the Court of Appeal observed that 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.
24. A party seeking a stay of execution must show that he will suffer substantial loss if stay is not granted. As to what amounts to substantial loss, courts have been clear that a party should show that he will suffer something special that cannot be reversed if stay is denied but his appeal eventually succeeds.
25. In *Machira T/A Machira & Co Advocates v East African Standard (No 2) [2002] eKLR*, the court stated that in attempting to demonstrate to court that substantial loss is likely to be suffered, an applicant is under a duty to do more than merely repeating words in a statutory provision or rule or general words used in some judgment or ruling in a decided case. It is not enough to merely state that substantial loss will result, or that the appeal if successful will be rendered nugatory as that will not do.
26. In *Kenya Shell v Benjamin Karuga Kibiru & another [1986] eKLR*, the Court of Appeal (Platt, JA) stated that:

If there is no evidence of substantial loss to an applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.
27. Similarly, in *Kenya Pipeline Co. Ltd v Zakhem International Construction Ltd (Civil Application No. E029 of 2020)*, the Court of Appeal again reiterated that where execution is with regard to a liquidated amount, there is no way an appeal, if successful, will be rendered nugatory.
28. The purpose of granting a stay of execution pending appeal is to preserve the subject matter of the appeal to enable a party exercise his right of appeal. A court should only exercise or decline to exercise this discretion if there are special circumstances and good cause either way. The inability of the successful party to refund the decretal amount in the event of a successful appeal would be one of such special circumstances, if proved.
29. The Applicant's concern, as I perceive it, is that execution, if allowed to proceed, will render it unable to continue with its business and pay salaries to its employees while pursuing the appeal against the impugned decision.. The Respondent has, however, argued that it will be able to refund the amount if the appeal succeeded, a claim the Applicant has rubbished, arguing that the Respondent is not in the habit of refunding decretal amounts once appeals are successful.
30. I must point out that at this stage, that the court is not making a substantive determination on the appeal. Its duty is to balance interests of the parties, a successful party who wants to enjoy the fruits of the litigation and a dissatisfied litigant who has mounted an appeal against that judgment. The court should be minded to preserve the subject matter of the appeal so that both parties are at arm's length as they pursue the issue on appeal, or make orders that circumstances of the case permit. At the same time, the Court should not lose sight of the fact that a successful litigant has a right that has crystallized.
31. In that regard, having considered the Application, the Response and Submissions, as well as decisions relied on and the law, I am of the considered view that the Application should be allowed but on



conditions. Consequently, the Application dated 7th January 2022 is allowed and the court makes the following orders:

- (a). Stay of execution is hereby granted on condition that the Applicant do pay to the Respondent Kshs. 5,000,000 within thirty (30) days from the date hereof.
- (b). Upon complying with (a) above, the agency notices dated 14th December 2021 issued by the Respondent and placed on the Applicant's bank account Nos. 001143696910800 and 147024416144 held at Equity Bank Green Span Mall and Kilimani Branches, respectively, shall stand set aside.
- (c). In default of (a) above, the order of stay shall stand vacated and the Respondent shall be at liberty to enforce the decision of the Tax Appeals Tribunal.

No order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY 2022

EC MWITA

JUDGE

