



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

TAX APPEAL NO E135 OF 2020

ZULEKA SAMJI.....APPLICANT

VERSUS

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

R U L I N G

1. This is a ruling on the applicant's Motion on Notice dated 17/11/2020. It is brought under **Rule 17, 18 and 19(1) of the High Court of Kenya (Organization and Administration) Rules 2016, Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Section 53 of the Tax Procedure Act and Section 3A of the Civil Procedure Act.**

2. The application seeks a stay of execution pending the hearing and determination of the appeal against the judgment of the Tax Appeal Tribunal dated 30/11/2020. The application was supported by the affidavit of **Zulekha Samji** sworn on 17/11/2020.

3. She contended that the judgment had been entered against her on 30/10/2020 against which she had since preferred an appeal which she considered to be meritorious. That no prejudice will be occasioned to the respondent if the stay is granted as she has already paid Kshs. 1,437,348/- in Capital gains Tax which should act as security for the stay.

4. In her latter affidavit of 23/2/2021, sworn in support of a Motion of even date, the applicant offered some title as security. She further contended that she had a terminally sick person in hospital and needed the funds in her accounts for her upkeep and medical expenses. By the time she was filing the second application, the respondent had issued agency notices against her bankers, Diamond Trust Bank Limited with a view to recover the tax from her **Account No's. [...], [...]** and [...], respectively. The Court froze the accounts pending determination of this application.

5. The respondent opposed the application vide a Replying Affidavit of **Kennedy Okoth** sworn on 26/1/2021. The respondent contended that there was no appeal to warrant the stay sought. That since the Notice of Appeal was filed and served on 16/11/2020, the appellant had 30 days to file the Record of Appeal. That the Record was only filed on 20/1/2021, 65 days after the Notice of Appeal and therefore out of time.

6. Accordingly, that the Record of Appeal was irregularly on record. That in the circumstances, no stay should issue.

7. On the merit of the application, it was contended that the appellant had not demonstrated how her appeal will be rendered nugatory. That she had enjoyed a free stay since 28/12/2016 when the assessment was concluded. That she was insincere in proposing that the sum of Kshs. 1,437,348/- paid as Capital gains tax be considered as security yet the same had been considered during the assessment on 16/9/2016.

8. It was further contended that the appellant had not demonstrated that she will suffer substantial loss if she paid the taxes that had been confirmed by the Tribunal. On the other hand, the government would lose the much needed revenue if a stay was granted. That since the appellant was an individual, there was apprehension that there is real and apparent danger that she may abscond payment of those taxes should this court uphold a blanket stay.

9. In her submissions dated 7/3/2021, the applicant submitted that this Court has jurisdiction to grant the stay sought under **Order 42 Rule 6(1) of the Civil Procedure Rules 2010**. That she had met the conditions under the law for the grant of the orders sought.

10. That she had offered a title for one of her properties as security on the basis that **section 103(2) of the Income Tax Act** recognizes that a property can be used to secure the taxes. That the respondent's submission that it is capable of refunding the taxes, if the appeal is successful, was untrue as it has been unable to settle the already outstanding claims on refunds.

11. On the other hand, the respondent submitted that the Court can only grant a stay upon satisfaction of the known conditions in law. That

this case did not invoke the exercise of this Court's discretionary power. That a stay should only be granted and the agency notices lifted on payment of security.

12. The Court has considered the opposing contentions of the parties and the submissions. Before considering the application on merit, the respondent contended that since the Record of Appeal was filed late, there was no appeal for any stay to be granted. A simple answer is that no application to strike out that Record has been made. The Record being on record is sufficient for the Court to consider the application for stay.

13. Under **Order 42 Rule 6 of the Civil Procedure Rules**, a stay can only be granted on an applicant satisfying three conditions; the application must be made timeously, the applicant must demonstrate substantial loss if the stay is not granted and security must be offered. See **Antoine Ndiaye vs. African Virtual University [2015] eKLR**.

14. In **Butt vs. Rent Restriction Tribunal [1979]**, the Court of Appeal observed that the power of the court to grant or refuse an application for stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, 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 the appeal court reverse the judge's discretion. Thirdly, 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. Finally, the court in exercising its discretion, whether to grant or refuse an application for stay, will consider the special circumstances of the case and its unique requirements.

15. On whether the application was filed timeously, the judgment was delivered on 30/4/2020. The present application was lodged on 17/11/2020. That was a period of only 17 days. That period cannot be said to be unreasonable. Accordingly, the application was filed timeously.

16. The second limb is substantial loss. In **James Wangalwa & Another vs. Agnes Naliaka Cheseto [2012] Eklr**, it was held: -

“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.”

17. In **RWW vs. EKW [2019] Eklr**, it was held: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

18. It was the applicant's submission that if the judgment of 30/10/2020 is executed, her appeal will be rendered nugatory. That her husband had a medical condition that required financial attention and with the imposed agency notices, she will be unable to take care of the medical needs. She produced medical records to back her claim. The respondent submitted that it was capable of refunding the money if paid or give credit for future tax liability.

19. The appellant contended that her husband was in real need of financial support. That he was dependent on her. However, an applicant who wishes the Court to exercise its discretion in his favour, he must be candid with the Court.

20. In the present case, the Court was not made aware of the total amount in credit in the sequestered accounts, the appellant's means of income, the projected approximate medical expenses that her husband may require, whether or not the husband has an insurance cover. All these are matters that would have enabled the Court to deal with the issue of substantial loss with much ease.

21. With such scanty material, the Court cannot be able to gauge whether the appellant would suffer substantial loss or not if she pays the taxes found to be due. What was clear was that her husband needed complicated medical attention. The appellant would definitely need the funds in those accounts to fend for herself and take care of him.

22. The next issue is security. In **Absalom Dova vs. Tarbo Transporters [2013] Eklr**, it was held: -

“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...”

23. In **Gianfranco Manenthi & another vs. Africa Merchant Assurance Company Ltd [2019] Eklr**, it was observed: -

“... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

24. From the above decisions, it is clear that the issue of security is discretionary and it is upon the court to determine the same.

25. The applicant submitted that she had already paid out Kshs. 1,437,348/= to the respondent and that the same ought to be considered as sufficient security. The respondent on the other hand retorted that the same had been taken into consideration during assessment in 2016 before the appellate process was began. In the Court's view it would be improper to consider the said sum as security when the same has already been taken care of before the impugned judgment. The Court rejects that offer.

26. The Court notes that the judgment amount is Kshs. 45,721,802/=. The appellant also submitted that she had offered title to one of her properties as security. However, the Court notes that no copy of the title was produced or the title number revealed or the value thereof. Further, no certificate of search was produced to prove the existence and ownership of the said property. This information would have enabled the Court to make an informed decision. This is a burden that lay with the appellant which she failed to discharge.

27. Accordingly, considering the totality of the circumstances of this case, I would allow the application on condition that the appellant pays security of Kshs. 10,000,000/-. The Agency Notices dated 17/2/2021 on the appellant's Account No. [...], Zulekha & Nizar Samji A/C No [...] and Zulekha/Nizar & Rahim Samji A/C No [...] all held at the Mombasa Road branch of Diamond Trust Bank be lifted on payment of the said security.

28. The costs shall abide the outcome of the appeal.

29. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2021.

A. MABEYA, FCI Arb

JUDGE