



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

HIGH COURT CIVIL CASE NO. 28 OF 2018

FAMILY SIGNATURE LIMITED.....APPELLANT

-VERSUS-

COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

RULING

1. This ruling relates to a Notice of Motion Application dated 12th July 2017, brought under the provisions of Sections 3A, 75, 78,79G of the Civil Procedure Act, Order 42 of the Civil Procedure Rules and all enabling Provisions of law.
2. The Applicant is seeking for orders that there be stay of execution of the Judgment passed on the 22nd day of February 2017, by the Honourable Tribunal and it granted leave to appeal out of time. The costs of this application be provided for.
3. The Application is supported by the grounds on the face of it and an Affidavit dated 13th July 2017, sworn by Rahab Mwihaki Karoki, the Director of the Appellant. She deposes that the delay in filing the Appeal was caused by lack of typed proceedings from the Tax Appeals Tribunal. That on the 30th day of March 2017, the Tribunal informed them that the proceedings were not available. A reminder was sent vide a letter dated 21st May 2017 and the Tribunal undertook to avail the proceedings, and availed the same on the 20th of June 2017.
4. Subsequently the Appellant began preparation of the Memorandum of Appeal as such the Appellant has brought the application without undue delay and the delay in filing the memorandum of appeal has been duly accounted for and there is no foreseeable prejudice that will be visited on the respondent.
5. That the Respondent has issued an Agency notice to M/S Equity Bank Limited to their bankers prompting the Appellant to move to the Tribunal to seek stay which Application was determined by way of compromise on the 25th day of May 2017, between the parties awaiting filing of this Appeal.
6. That stay of execution has been maintained through the said compromise and certainly no prejudice has been visited on the Respondent to whom the Appellant has remained cooperative and consequently the Appellant stands to suffer irreparable damage and its appeal rendered nugatory should the Respondent proceed to execute the said Judgment.
7. The Respondent did not file any response to the application save for the submissions. The Appellant in its submissions reiterated that it had the intention to bring this Appeal in good time but was otherwise presented by circumstances beyond it.
8. That the law relating to enlargement of time to bring appeals out of time requires the court to examine that there has been ordinate delay, that the Respondent will not be prejudiced and that the Appellant has an arguable case with a high probability of success.
9. In this case the Judgment was passed on 22nd February 2017, and the proceedings were made available on 20th June 2017 and this appeal was filed on 13th July 2017. That the delay from the date when the proceedings were availed to when this Application was filed is accounted for as the time it took the Appellants Advocates to peruse the record, consulting with the Appellant's Tax Agents and preparing for trial. The period is reasonable and quite inordinate with regard to whether the Appellant has an arguable appeal with a high probability of success, the memorandum of appeal filed herein demonstrates 6 grounds of appeal each of which highlights the Honourable Tribunals misapprehension of the law.
10. It was also submitted that, considering the amount in question and the seriousness of the grounds of appeal, it would be unfair for the Respondent to execute the Judgment against the Appellant. The demand of the decretal sum will have the obvious effect of rendering the appeal nugatory.

11. On the other hand, should the execution of the decree be effected, the Appellant will face substantial loss considering the amount in question. The nature of the Appellant's business does not require such high liquidity and consequently requiring payment of the decretal sum would lead to substantial loss and strain of the business. Notwithstanding this fact, the Appellant is able and willing to make good the Respondent's claim. The Appellant if unsuccessful shall fall back on its available assets to make good the Respondents Judgment and consequently grant of stay of execution in this matter shall serve the purpose of protection of the Appellant's right to access court but not to defeat the Respondent's Judgment.

12. That the exercise of the Court's discretion should tilt towards the Appellant while granting stay of execution. The unique position and the relationship between the Appellant and the Respondent should be considered since the Respondent remains a permanent stakeholder in the Appellants business. There indeed will be no prejudice on the Respondent.

13. Finally, it was submitted the Respondent enjoys wide legal powers to collect the decretal sum under the Tax Procedures Act and consequently the chances of prejudice are remote.

14. The Respondent of his part submitted that the Supreme Court held in the case of; Gairau Peter Munya –vs- Dickson Mwenda Kithiji and 2 Others. Application No. 5 of 2014 that the principles governing the grant of interim stay orders are that an applicant must establish a prima facie case with a high probability of success; he must prove that irreparable loss which cannot be compensated in damages and that the balance of convenience is in favour of the grant of such stay orders.

15. That in the instant case, the Applicant has not established a prima facie case with a high probability of success and that under order 42 Rule 6 (2) "no order for stay of execution shall be made ... unless (a) the court is satisfied that substantial loss may result to the 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.

16. Reliance was placed on the case of; Kenya Power & Lightening Co. Ltd –vs- Esther Wanjiru Wokabi Civil Appeal No. 326 of 2013 which adopted the position in Global Tours & Travels Limited; Nairobi HC winding Up Cause No. 43 of 2000 as follows;

" As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice ... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously"

17. It was therefore submitted that the applicant has neither established prima facie merits of the intended appeal nor established sufficient cause that it is in the interest of justice to grant the orders sought. The appeal is meant to only frustrate the Respondent in exercising its duties and thus should be dismissed with costs to the Respondent. The case of; Mrao Ltd First American Bank of Kenya Limited & Two others (2003) was cited, where the Court held that,

"prima facie case" , the Court held that, a prima facie case in a civil application includes but is not confined to a "genuine and arguable case."

18. I have considered the application, the affidavit in support and the prayers therein. I have also considered the sentiments expressed by Ms. Lumadi appearing for the Respondents on 13th September 2013 that they are not opposed to the application save for the provision of the security and in particular, the admitted sum of Ksh 69,000,000 less Kshs 22,000,000 already paid.

19. In the said application, the Applicant seeks for stay of a Judgment dated 22nd February 2017 and leave to file an Appeal out of time against the said judgment. The Respondents having no objection thereto, I allow the two (2) prayers on the following terms;

(i) That the Memorandum of Appeal dated 12th July 2017 be and is hereby deemed to be properly filed and on record. In that regard, the same should be served upon the Respondent forthwith;

(ii) With regard to stay, I order that the Applicant provides security for the amount claimed Kshs 47,000,000 within a period of fifteen (15) days of date of this order or form of a Bank guarantee acceptable by the Respondent;

(iii) In default thereof, the stay of stay will automatically lapse and execution may proceed.

20. The upshot of this is that the application is allowed on the terms stated above and the parties should proceed forthwith and process the Appeal for expeditious disposal thereof.

21. Those then are the orders of the Court.

Dated, delivered and signed in an open Court this 12th day of October 2018.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Osoro for Githinji for the Plaintiff/Respondent

Mr. Ngare for Ms. Lumadi for the Defendant/Applicant

Langat.....Court Assistant