

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 337 OF 2019

OKIYA OMTATAH
OKOITI.....PETITIONER

VERSUS

THE CABINET SECRETARY, NATIONAL
TREASURY.....1ST
RESPONDENT

THE ATTORNEY GENERAL.....2ND
RESPONDENT

COMMERCIAL BANK OF AFRICA.....3RD
RESPONDENT

NIC GROUP PLC.....4TH
RESPONDENT

NCBA GROUP.....5TH
RESPONDENT

THE CABINET SECRETARY, LANDS
AND PHYSICAL PLANNING.....6TH
RESPONDENT

RULING

1. NCBA Group, the applicant, has brought this application seeking for stay of execution of the judgment of this court delivered on 4th April 2025, pending appeal. The applicant seeks an injunction restraining the respondents; including the Collector of Stamp Duty and Kenya Revenue Authority (KRA), their agents and or assigns from demanding or initiating enforcement action to levying or collecting stamp duty on the instruments executed in relation to the merger between NIC Group PLC and Commercial Bank of Africa Ltd (CBA).
2. The application is brought under rule 32 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure

Rules, 2013 (Mutunga Rules) and Order 42 rule 6 of the Civil Procedure Rules.

3. The application is premised on the grounds that the applicant has lodged an appeal against the judgement of this court declaring the decision to exempt the instruments executed in respect to the transactions relating to the merger from paying stamp duty violated section 106(1) of the Stamp Duty Act and article 201 of the Constitution and invalidated Legal Notice No. 112 dated 26th June 2019 exempting payment of stamp duty on those instruments as unconstitutional.

4. The applicant has filed a Notice of Appeal; applied for copies of proceedings and judgment for purposes of lodging the appeal and it is apprehensive that it may take a while before proceedings are supplied. The applicant asserts

that the appeal raises good grounds of appeal, including that the court erred by misapplying the public interest principle in relation to the tax waiver granted for the merger transaction and the constitutional principle on sharing tax burden in article 201 (b) (i) of the Constitution.

5. The applicant urges that if stay of execution is not granted, KRA will proceed to execute the judgment leading to immediate payment of Kshs. 384.5 million thus, result in substantial loss which KRA will not be able to refund should the appeal succeed. This will render the appeal nugatory and an academic exercise.

6. The applicant states that it is willing to abide by any conditions regarding security the court may determine especially provision of a bank

guarantee. The applicant maintains that the application has been brought timeously; the petitioner will not be prejudiced and it is in the interest of justice that the application be granted.

Response

7. The petitioner (Okiya Omtatah) has opposed the application through a replying affidavit. The petitioner supports the judgment and asserts that the court is *functus officio* having rendered itself on the constitutionality of the impugned waiver. The petitioner again asserts that the judgment is well grounded on statutory interpretation and constitutional principles.

8. The petitioner maintains that the applicant has not demonstrated the irreparable harm to be suffered if stay is not granted; the application does not

meet the threshold for granting stay of execution; and should the intended appeal succeed, KRA is able to refund any stamp duty paid.

9. The petitioner takes the position, that the appeal does not raise any arguable constitutional questions but seeks to relitigate issues already determined by this court, specifically regarding section 106 of the Stamp Duty Act. The petitioner asserts that the balance of convenience and public interest favour immediate enforcement of the judgment.

Applicant's submissions

10. Mr. Regeru, learned senior counsel representing the applicant, has argued that rule 32 of the Mutunga rules and Order 42 rule 6 of the Civil Procedure Rules, confer on this court discretion to grant stay of execution. Learned

senior counsel relies on the decisions in *Amal Hauliers Limited v Abdulnasir Abukar Hassan* [2017] eKLR; *John Mbaabu & another v Kenya Revenue Authority* [2020] eKLR; *David Kipsang Kipyego & another (The Registered Trustees of the Serve in Love Africa (SILA) v Registrar of Documents, Ambrose Kiprop & 4 Others; Eric Kiptum Teimuge (Interested Party)* [2019] eKLR; *Selestica Limited v Gold Rock Development Ltd* [2015] eKLR; *Butt v Rent Restriction Tribunal* [1979] eKLR and *Prilscot Company Limited v Monica Heho* [2015] eKLR.

11. Learned senior counsel submits that the applicant has complied with the requirements for granting stay of execution; the application has been brought timeously as required by rule 32(2) of the Mutunga Rules; the applicant has demonstrated that it will suffer substantial loss

should stay be denied and the applicant is ready to provide security for the due performance of the decree should the court so direct.

12. According to learned senior counsel, the money held by the applicant at any time are deposits belonging members of the public and institutions both in the private and public sectors and therefore immediate payment of the waived stamp duty will directly affect third parties who are not involved in the dispute and whose financial interests are at stake. Learned senior counsel relies on the decision in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR for the position that the applicant stands to suffer substantial loss if stay is not granted.

13. Mr. Regeru, SC, further argues that immediate payment of the waived stamp duty of Kshs. 384.5 million will have an adverse the impact by

disrupting the applicant's business. If the waived stamp duty is paid and the intended appeal eventually succeeds, there is no certainty that the money will be recovered. The uncertainty is precipitated by the fact that there is no clear legal mechanism under the Stamp Duty Act through which a refund of the amount may be processed and paid out. Even if a refund of the money paid is ordered, there is no certainty as to when the refund would be made. The only refund mechanism available under section 27 of the Stamp Duty Act is strictly in cases of over assessment of tax which is not the position in this case so that statutory refund is inapplicable to this matter.

14. Learned senior counsel relies on the decisions in *Kan Travellers Company Limited & another v Ndalulwa & Savola Suing as legal representative of the Estate of the Late Zacharia Wasike*) & another

[2023] KEHC 2846 (KLR) and *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another* [2018] eKLR for the position that the applicant is ready and willing to comply with such reasonable terms on security as the court may direct.

15. Mr. Regeru, SC. again relies on the decisions in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358; *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR and *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR for the position that the applicant has established a *prima facie* case for purposes of granting the orders sought to obviate irreparable damage because enforcement of the decree will undermine the financial structure of the merger. The applicant stands to forfeit the benefits of the merger because stamp duty waiver was one of the considerations in the transaction's structure which

may potentially result in irreversible business consequences.

16. Learned senior counsel again relies on *Rentco East Africa Limited v Kimeto* [2025] KEHC 5885 (KLR) for the position that the balance of convenience tilts in the applicant's favour. Enforcement of the decree at this stage will cause substantial and irreversible harm because stamp duty waiver was a central element in the financial structuring of the merger.

17. In learned senior counsel's view, payment of stamp duty threatens to undermine the commercial and strategic foundations of the merger thereby discounting shareholder value; planned integrations and future business projections since financial implications of enforcing the judgment are significant and immediate. Execution of the decree now will place an undue

financial burden on the applicant thereby disrupting its capital allocation, liquidity planning and compliance with regulatory obligations.

18. Mr. Regeru, SC. maintains that public interest favours granting the orders sought since the merger involved two significant financial institutions in the banking sector with direct implications on the market stability, investor confidence and economic growth. The respondents will not suffer any prejudice.

19. Learned senior counsel maintains that the court is not *functus officio* and has jurisdiction to hear the application. *Functus officio* doctrine only prevents a merit based decisional re-engagement with a case once final judgment has been rendered. In the present circumstances, the application does not seek review, variation, or setting aside of the judgment but stay of execution

of the judgment. *Functus officio* does not also apply where a court is conferred with statutory jurisdiction to hear a matter. Senior counsel relies on the decisions in *Telkom Kenya Limited v John Ochanda (Suing on His Behalf and on Behalf of 996 Former employees of Telkom Kenya Limited)* [2014] eKLR and *Dickson Muricho Muriuki v Timothy Kagonda Muriuki & 6 others* [2013] eKLR.

20. Learned senior counsel argues that an appeal has already been filed (Civil Appeal E41/2025-NCBA Bank Kenya Plc v Okiya Omtatah Okoiti & 3 others) and therefore public interest favors preserving the *status quo*. Immediate enforcement of the judgment will occasion great hardship on the applicant's operations because the applicant will be compelled to pay over Kshs. 384.5 million excluding interest and penalties.

21. Mr. Regeru again relies on the decision in *Commission on Administrative Justice v Insurance Regulatory Authority & Another* [2017] eKLR for the position that the banking industry is inherently vested with public interest as its operations are based on deposits belonging to members of the public. Executing the judgment will affect the applicant's customers and necessitate immediate drawing from operational funds, including deposits held for the public.

22. Learned senior counsel maintains that the petitioner has not demonstrated any imminent harm that would justify immediate enforcement of the judgment. He relies on the decision in *Kenya Electricity Transmission Co. Ltd (KETRACO) v Instalanciones Inabensa S.A* [2022] eKLR for the submission that beyond the immediate financial implications, the judgment raises complex legal

questions on the interpretation of statutory tax exemptions and the regulatory treatment of mergers. Immediate execution may lead to uncertainty and inconsistent administrative actions. Senior counsel relies on *National Assembly, Republic of Kenya & another v Matindi & 3 others* [2023] eKLR and urges the court to allow the application.

Petitioner's submissions

23. Mr. Okiya Omtatah, the petitioner, has made oral submissions in opposing the application. Mr. Omtatah reiterates his position that the court is *functus officio*; the judgment took effect immediately; the court cannot be stayed its own judgment and that the application is an attack on the merit of the judgment which can only be done through an appeal.

24. Mr. Omtatah maintains that the application does not meet the threshold for granting the orders sought; no substantial loss has been demonstrated and no public interest will be served by granting stay.

25. Regarding substantial loss, Mr. Omtatah argues that there will be substantial loss if money paid can be reimbursed. In any event, if the appeal was to succeed, KRA is capable of refunding stamp duty paid. Reliance is placed on the decision in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (K)* [2019] eKLR.

26. According to Mr. Omtatah, the intended appeal is not arguable; the waiver was to serve a private interest and the Banking Act cannot override the Constitution and constitutional principles. In his view, public interest favours immediate execution of the decree. He argues that declaration of

unconstitutionality cannot be suspended through an application for stay.

27. Mr. Omtatah goes on to argue on the importance of articles 10 and 201 of the Constitution maintaining that granting stay would undermine the principle in article 159 (2) (d) of the Constitution. He relies on the decisions in *Butt v Rent Restriction Tribunal* [1979] eKLR; *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KLR and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR and urges the court to dismiss the application.

Determination

28. I have considered the application, the response, arguments by parties and the decisions relied on. The applicant has urged this court to grant stay of execution of the judgment delivered

on 4th April 2025 pending appeal. In that judgment, this court held that the notice waiving stamp duty on the documents executed with regard to the merger transaction is unconstitutional and therefore invalid. It is that decision that the applicant has sought to stay pending the hearing and determination of its appeal in the Court of Appeal. The petitioner who is the respondent in this application has opposed the application arguing that it is not merited and that the supplicant will not suffer substantial loss.

29. The issue the petition sought to have determined was the constitutionality of the action taken to waive stamp duty under section 106 of the Stamp Duty Act on the instruments executed for the merger which action the court held to be unconstitutional. The applicant has challenged the court's decision in the Court of Appeal and has now

sought stay of execution of that decision pending appeal, an application the petitioner opposes.

30. I have considered arguments on this application. The court was moved and exercised its jurisdiction under article 165(3) (d) on the interpretation of the Constitution and determination of whether anything said to have been done under the authority of the Constitution or any law is inconsistent with, or in contravention of, the Constitution.

31. The court heard the petition and determined that the waiver of stamp duty was unconstitutional and illegal and issued a declaration to that effect. The court also issued an order of certiorari quashing the notice giving exemption on payment of stamp duty on the instruments executed for the purpose of the merger. That declaration was issued in terms of article 23(3)(a) of the Constitution.

32. When the court is moved to determine the constitutionality of an action, article 165(3) (b) and (d) puts the court on an investigative mode to determine specific questions, namely; whether a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened and whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

33. If the court's finding is positive that the impugned law or action violates rights and fundamental freedoms in the Bill of Rights or is inconsistent with or in contravention of the Constitution or the law, article 2(4) of the Constitution takes immediate effect and the declaration issued by the court is to reinforce what article 2(4) has invalidated and the law or action

ceases to be of any legal effect. This is because article 2(4) is clear that any act or omission in contravention of the Constitution is invalid and the court issues the declaration as required by article 23(3)(a) of the Constitution.

34. The fact that a declaration of invalidity takes immediate effect was articulated by the Court of Appeal in *Speaker of the National Assembly & another v Orange Democratic Movement Party & 8 others* [2025] KECA 681 (KLR), following its decision in *National Assembly & 47 Others v Okiya Omtatah Okoiti & 169 Others* [2024] KECA 39 (KLR) that the essence of granting stay would mean that a law or [an action] that has been found to be constitutionally infirm, will continue being in operation pending the hearing of the appeal.

35. In *National Assembly & 47 Others v Okiya Omtatah Okoiti & 169 Others* (supra), the court of

Appeal stated that the presumption of constitutional validity in respect of impugned sections [or action] is extinguished the moment the trial court issues the declaration. The Court of Appeal held that it would not be in public interest to grant a stay whose effect is to allow what had been found to be constitutionally infirm to continue, pending the hearing of an appeal.

36. In this application, the applicant has asked this court to stay execution of the judgment and decree rendered in this matter. In the view of this court, a reading of article 165(3) (b) and (d) shows that the court's mandate is to investigate whether a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened and whether anything said to be done under the authority of the Constitution or any law is inconsistent with, or in contravention of, the

Constitution. If the court finds that there is violation or contravention of the Constitution, article 2(4) invalidates the action or omission. As the trial court, the court retains no residual jurisdiction that would allow it to stay the declaration of invalidity whose effect would amount to suspending the taking effect of article 2(4) of the Constitution over the invalidated action since there is no constitutional provision allowing the trial court to suspend a declaration of invalidity that would have the effect of suspending article 2(4) of the Constitution from taking effect.

37. The applicant has relied on rule 32 of the Mutunga Rules for the argument that it gives the court jurisdiction to grant stay. Rule 32 provides that an appeal or second appeal shall not operate as a stay of execution or proceedings under a decree or order appealed. Sub rule (2) requires

that an application for stay of execution may be made informally immediately following the delivery of judgment or ruling and the court may issue such orders as it deems fit and just. Sub rule (3) states that a formal application for stay may be filed within 14 days of the decision appealed from or within such time as the court may direct.

38. It is correct that rule 32 grants the court discretion to grant stay of execution or proceeding. This is a discretionary power which, like any other discretion, must be exercised judiciously. That; is the court may grant stay in matters it deems fit to do so but not in every matter.

39. The issue in this petition was the constitutionality of actions taken and which in the view of this court, were unconstitutional. This court having so determined, it will not be appropriate for the same court to stay its own decision declaring

the actions constitutionally invalid which will amount to suspending the declaration of invalidity with the result of restoring the actions that have been nullified for being unconstitutional. Whether the court was right; misinterpreted or misapplied the Constitution or the law are issues to be determined by the appellate court. This court may not be in a position to do a self-assessment on whether its decision especially on the declaration of constitutional invalidity is right or wrong. This is an issue to be argued in the appeal.

40. The applicant again argues that if stamp duty is paid before the appeal is heard and determined and the appeal eventually succeeds, KRA may not refund the money because there is no legal mechanism for doing so. I do not think this is correct. The applicant has not argued that KRA will not have the financial ability to refund the money.

KRA is a public entity and is capable of refunding money should the appeal succeed. I do not think the applicant's fear that it will not get a refund is well founded. The argument that the applicant will suffer substantial loss is also not well founded.

41. In the circumstances, it would be inappropriate and possibly contrary to article 2(4) of the Constitution for this court, as the trial court, to grant stay of its decision declaring the gazette notice exempting payment of stamp duty unconstitutional. Consequently, and for the above reasons, the application is declined and dismissed. Each party will bear their own costs.

Dated and delivered at Nairobi this 14th Day of November 2025

**E C MWITA
JUDGE**