

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**HCCOMMITA NO. E028 OF 2025**

WILLY WALLA INTERNATIONAL LIMITED.....APPELLANT

-VERSUS-

THE COMMISSIONER OF INVESTIGATION

AND ENFORCEMENT.....RESPONDENT

**RULING**

1. Before me is a Notice of Motion application dated 19<sup>th</sup> February 2025 filed by the appellant pursuant to the provisions of Section 32 of the Tax Appeals Tribunal Act and all enabling provisions of the law, seeking an order for stay of proceedings in **TAT No. E403 of 2024**, pending the hearing and determination of this Appeal.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Wilson Kanani, the appellant's Director. Mr. Kanani averred that the appellant filed an application before the **Tax Appeals Tribunal in TAT No. E403 of 2024**, seeking leave to introduce additional documents, amend the Memorandum of Appeal and statement of facts, and an order to restrain the Directorate of Criminal Investigations from probing the appellant's tax affairs relating to the period under litigation. He stated that the Tribunal dismissed that application in a Ruling delivered on 11<sup>th</sup> February 2025, prompting the appellant to lodge this Appeal.

3. Mr. Kanani stated that the matter before the Tribunal was scheduled for mention on 20<sup>th</sup> February 2025 for directions on setting of a hearing date. He also stated that unless an order for stay of proceedings in **TAT No. E403 of 2024** is granted, the Tribunal will proceed to hear and determine the matter before it, thereby rendering this Appeal nugatory. He asserted that this Appeal has merits with high chances of success and has been filed without unreasonable delay.
4. In opposition to the application herein, the respondent filed Grounds of Opposition dated 28<sup>th</sup> February 2025, raising the following issues-
  - i) That the appellant's application filed at the Tax Appeals Tribunal was filed in contravention of Section 14 of the Tax Appeals Tribunal Act, which provides that the Civil Procedure Act (Cap 21) of the Laws of Kenya does not apply to proceedings before the Honourable Tribunal;
  - ii) That the Tribunal correctly determined at paragraph 16 of its Ruling that the appellant's application filed at the Tax Appeals Tribunal was incompetent and ought to be struck out as it was filed by a stranger, as the firm of Brian Odhiambo & Associates Advocates was not on record for the appellant/applicant in this matter;
  - iii) That the Tribunal correctly determined at paragraph 17 of its Ruling that the appellant/applicant herein, was seeking leave to adduce additional documents from the Ethics and Anti-Corruption Commission, an entity that was yet to return the documents seized from the appellant/applicant to date;

- iv) That the Tribunal correctly analyzed that it does not have power to order or direct the Ethics and Anti-Corruption Commission (EACC) to return seized documents to the appellant/applicant since EACC was and is still not a party to the matter before the Tribunal nor is EACC a party to this application before this Court;
- v) That the appellant/applicant being a party to a High Court matter seeking to execute the High Court Judgment, the appellant/applicant can only execute the same at the proper forum of the High Court and not before the Tribunal nor before this forum since EACC is not a party to this Appeal;
- vi) That the Tribunal correctly determined at paragraph 18 of its Ruling that the appellant/applicant herein sought leave to amend its Memorandum of Appeal and Statement of Facts yet failed to attach any draft amended pleadings to enable the Tribunal to determine whether new issues were to be introduced in the proceedings as required under the Rules;
- vii) That the Tribunal correctly determined at paragraph 19 of its Ruling that the appellant/applicant sought orders to restrain the Directorate of Criminal Investigations (DCI) from investigating the appellant/applicant's tax activities yet once again DCI was not a party at the proceedings before the Tribunal nor is the DCI a party to the proceedings before this proceedings (sic);
- viii) That the application is a mere derailing tactic employed by the appellant/applicant in this matter as it seeks to file documents that its Director had sworn on oath that they are not even in its custody;

- ix) That the appellant/applicant's current Statement of Facts as filed before the Tribunal indicated that it had provided sufficient information and documentation as required;
- x) That the appellant/applicant did not bring it to the attention of the respondent during its various engagement sessions nor did it bring it out in its Appeal documents of any inadequacy of its documents due to any other ongoing case;
- xi) That Section 193A of the Criminal Procedure Code, Cap 75 Laws of Kenya, provides for concurrent civil and criminal proceedings;
- xii) That the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings;
- xiii) That this matter was mentioned on 20<sup>th</sup> February 2025 and the matter was given another mention date of 12<sup>th</sup> March 2025 to fix a hearing date;
- xiv) That it is also important to bring it out to the Court that both parties had already complied with the Tribunal's directions on filing of submissions by the time the appellant/applicant filed its application before the Tribunal;
- xv) That the application herein is frivolous, without merit and the same is an utter abuse of the powers of this Honourable Tribunal;
- xvi) That the application is baseless, inept and not grounded on the law; and
- xvii) That with such a bare application, the discretion of this Honourable Tribunal cannot be invoked.

5. The application herein was canvassed by way of written submissions. The appellant's submissions were filed by the law firm of Brian Odhiambo & Associates Advocates on 13<sup>th</sup> March 2025 & 17<sup>th</sup> July 2025, while the respondent's submissions were filed on 25<sup>th</sup> March 2025 by Ms Megan Muthoni, Advocate.
  
6. Mr. Odhiambo, learned Counsel for the appellant cited the Court of Appeal case of **Daniel Kibet Mutai & 9 others v Attorney General** [2019] KECA 125 (KLR), and submitted that the instant application is undefended, noting that the respondent failed to file a replying affidavit to controvert the factual averments set out in the supporting affidavit. Counsel argued that the grounds of opposition filed address issues relating to the substantive Appeal rather than the instant application, thus they cannot amount to a proper response to the issues raised in the application herein.
  
7. Mr. Odhiambo submitted that the conditions for being granted an order for stay of proceedings have been satisfied. He cited the case of **Global Tours & Travels Limited**, Nairobi HC Winding Up Cause No. 43 of 2000 and further submitted that the power to stay proceedings is discretionary and should be exercised in the interest of justice. He referred to the appellant's grounds of appeal, which include assertions that the Tribunal failed to exercise its discretion judiciously, erroneously held that the appellant's Advocate was not properly on record, and refused to grant leave to file additional documents or amend the Memorandum of Appeal. He contended that the Tribunal misconstrued the application by addressing the issue of whether the EACC should release seized documents, an issue that had not been raised and incorrectly concluded that the appellant did not have the documents contrary to

Rule 10 of the Tax Appeals Tribunal (Procedure) Rules and Section 26 of the Tax Appeals Tribunal Act, which require the Tribunal to give parties a reasonable opportunity to present their cases.

8. Mr. Odhiambo argued that the Tribunal erred in holding that the application before it was filed by a person not properly on record, noting that Order 9 Rule 1 of the Civil Procedure Rules, 2010, does not require a Notice of Change of Advocates, and that procedural omissions are curable under Article 159(2)(d) of the Constitution. Counsel disputed the Tribunal's finding that the DCI was not a party to the proceedings, asserting that DCI Officers were acting under the instructions of the respondent, resulting in unlawful interference with an active Appeal and exposing the appellant to double jeopardy. He asserted that the instant application has been filed promptly noting that the impugned Ruling was delivered on 11<sup>th</sup> February 2025, whereas the instant application was filed on 19<sup>th</sup> February 2025.
9. Ms Otieno, learned Counsel for the respondent submitted that interlocutory stay of proceedings pending Appeal should be granted only sparingly and in exceptional circumstances. She relied on Section 13 of the Tax Appeals Tribunal Act, which requires the Tribunal to determine Appeals within strict statutory timelines, noting that the Appeal before the Tribunal was filed on 11<sup>th</sup> April 2024 and is nearly a year old. Ms Otieno referred to the case of **Global Tours & Travels Limited** (supra), and stated that the Court must weigh the need for expeditious disposal of cases, judicial time and the absence of prejudice, and that the appellant has not demonstrated any exceptional circumstances to warrant being granted the Orders being sought herein. She further stated that at the time the application herein was filed, the Tribunal was poised to adopt submissions and proceed to judgment on 19<sup>th</sup> March 2025.

10. Ms Otieno relied on the case of **Access Bank Kenya PLC v Mengich & another** [2024] KEHC 5682 (KLR), and contended that the appellant lacks a *prima facie* arguable Appeal, noting that the Tribunal found that the appellant's representative was not properly on record and that the appellant had not annexed the pleadings filed before the Tribunal, the intended amendments, or the additional documents it seeks to introduce. Counsel asserted that the appellant did not have the documents it sought leave to file and that it had not disclosed the nature of the proposed amendments. She submitted that there is no substantive issue for determination in this Appeal and that the instant application has not demonstrated why the Tribunal proceedings should not proceed to conclusion, after which any grievances may be addressed in a single appeal at the High Court.
11. In a rejoinder, Mr. Odhiambo referred to the case of **Wilson Nashon Kanani v Commissioner of Investigation and Enforcement, TAT E404 of 2024** (unreported), involving the appellant's Director and arising from similar facts, where the Tribunal allowed an application to introduce and file additional documents that had been seized by the EACC. He argued that although the Tribunal's decision is not binding on this Court, it is persuasive and demonstrates that in comparable circumstances, the Tribunal exercised its discretion in favour of allowing the filing of new documents.

#### **ANALYSIS AND DETERMINATION.**

12. Upon consideration of the instant application, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the respondent and the written submissions by Counsel for the parties, the issues that arise for determination are –

- i) Whether the application herein is properly defended; and**
- ii) Whether an order for stay of proceedings should issue.**

**Whether the application herein is properly defended.**

13. In opposition to the instant application, the respondent did not file a replying affidavit to challenge and/or controvert the sworn averments by the appellant. Instead it only filed grounds of opposition dated 28<sup>th</sup> February 2025. It is now well settled that grounds of opposition are general averments and cannot amount to proper or valid denial of allegations made on oath. In the case of **Peter O. Nyakundi & 68 others v Principal Secreary, State Department of Planning, Ministry of Devolution and Planning & another** [2016] KEHC 467 (KLR), the Court in addressing a claim where the respondent had failed to file a replying affidavit held as follows-

*As stated earlier the respondents did not file any replying affidavit to challenge and/or controvert the sworn averment by the petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (See *Mereka & Co Advocates v Unesco Co Ltd 2015 eKLR, Prof Olaka Onyango & 10 others v Hon Attorney General Constitution Petition No 8 OF 2014 and Eliud Nyauma Omwoyo & 2 others v Kenyatta University*). The respondents have failed to refute specifically the allegations in the petitioner's sworn affidavit in support. Failure to file a replying affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.*

14. Although Order 51 Rule 14 of the Civil Procedure Rules, 2010, recognizes grounds of opposition as a valid mode of responding to an application, failure to file a replying affidavit means that the averments contained in the affidavit in support of an application are deemed to be admitted. Therefore, considering the fact that the respondent only filed grounds of opposition, it is this Court's finding that the averments contained in the affidavit in support of the application herein are not rebutted, thus the application stands unopposed.
15. Nevertheless, this Court still has a duty to consider the application herein on its merits.

**Whether an order for stay of proceedings should issue.**

16. The **Halsbury's Law of England 4<sup>th</sup> Edition Volume 37**, pages 330 to 332, states as hereunder in respect to stay of proceedings -

*The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.*

17. The principles for stay of proceedings were considered by the Court in the case of **Re Global Tours & Travel Ltd**, (supra), where Ringera J., held that -

*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 for 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.*

18. Further, in the Court of Appeal case of **Chris Munga N. Bichage v Richard Nyagaka Tongi, Independent Electoral & Boundaries Commission & Robert K. Ngeny** [2013] KECA 141 (KLR), the Court considered the principles to be established before an order for stay of proceedings can issue and stated as follows-

*The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.*

19. This Court has the requisite jurisdiction to issue an order for stay of proceedings. Such discretion can however, only be exercised subject to the plaintiff establishing the principles that have since been laid down by the Courts.

20. There is already an Appeal pending in this Court against the Ruling of the Tax Appeals Tribunal delivered on 11<sup>th</sup> February 2025. This Court is therefore tasked with determining whether the said Appeal is arguable to warrant it to exercise its discretion in favour of the appellant.
21. Upon perusal of the appellant's Memorandum of Appeal dated 19<sup>th</sup> February 2025 filed in this Appeal, it is apparent that this Appeal is premised on grounds that the learned members of the Tax Appeals Tribunal erred both in law and fact by failing to exercise their discretion judiciously. The appellant's case is that the Tribunal wrongly found that its Advocate was not properly on record and further erred in declining to grant the appellant leave to file additional documents and to amend its Memorandum of Appeal. The appellant also faulted the Tribunal for holding, or implying, that the DCI attached to the respondent could continue with criminal investigations and prosecution against the appellant despite the pendency of the Appeal. Additionally, the appellant asserted that the Tribunal disregarded the evidence the appellant had placed before it.
22. From the foregoing, it is evident that the appellant's bone of contention with the Tax Appeals Tribunal is that it acted improperly by misapplying its discretion and making procedural and substantive errors that prejudiced the appellant's case. The appellant challenges the Tribunal's legal findings claiming that they were unfair and contrary to the proper laid down legal procedure. In light of the above and noting the provisions of Section 56(2) of the Tax Procedures Act provide that an Appeal to the High Court or to the Court of Appeal shall be on questions of law only, I am persuaded that the appellant's Appeal is arguable
23. As to whether there exist exceptional circumstances to warrant the appellant being granted the orders being sought herein, this Court is alive to the fact that

this Appeal arises from a decision of the Tax Appeals Tribunal, which is guided and/or operates within the confines of the Tax Procedures Act and the Tax Appeals Tribunal Act. As correctly submitted by the respondent, the time within which the Tax Appeals Tribunal is supposed to determine an Appeal is provided for under Section 13(7) of the Tax Appeals Tribunal Act which provides that -

***The Tribunal shall hear and determine an appeal within ninety days from the date the appeal is filed with the Tribunal.***

***Provided that in case the panel is not able to conclude hearing an appeal within ninety days, the panel may through a resolution made by not less than half of its Members, extend the time for hearing and determination of the appeal by not more than thirty (30) days.***

24. In view of the analysis I have made, it is my finding that exceptional circumstances exist to warrant the appellant being granted the orders being sought herein, and noting that the current status of the diary of this Court and the duration of time it takes for Appeals to be heard and determined, and bearing in mind the respondent's submissions that at the time the application herein was filed, the Tribunal was ready to adopt submissions filed by parties and proceed to Judgment on 19<sup>th</sup> March 2025, it is apparent that this Appeal shall be rendered nugatory if I do not grant stay of proceedings. There are high chances that the Tax Appeals Tribunal will have delivered its Judgment for the Appeal before it and the said Judgment will be executed before this Appeal is heard and determined.

25. The impugned Ruling was delivered on 11<sup>th</sup> February 2025, whereas the instant application was filed on 19<sup>th</sup> February 2025, approximately eight (8) days later. I am therefore satisfied that the instant application was filed timeously.
26. In the circumstances, this Court finds that the appellant has satisfied the legal threshold for being granted an order for stay of proceedings.
27. The upshot is that the instant application is merited. It is hereby allowed in the following terms –
- i) I hereby grant stay the proceedings in TAT No. E403 of 2024 pending the hearing and determination of this Appeal; and**
  - ii) Costs shall abide the outcome of the Appeal.**

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 18<sup>th</sup> day of December 2025. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI  
JUDGE**

**In the presence of:-**

Mr. Odhiambo for appellant

Ms Mulinge h/b for Mr. Chabala for the respondent

Ms B. Wokabi – Court Assistant.