



**ECP Kenya Limited v Commissioner of Domestic Taxes (Civil Application
E729 of 2025) [2026] KECA 844 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KECA 844 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E729 OF 2025
JM NGUGI, P LILAN & M SILA, JJA
APRIL 30, 2026**

BETWEEN

ECP KENYA LIMITED APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

*(Being an application for stay of execution of the Judgment and
Decree of the High Court of Kenya at Milimani (C. Kariuki, J.)
dated 14th November 2025 in Income Tax Appeal No. E215 of 2023)*

RULING

1. Before this Court is a Notice of Motion dated 1st December 2025 brought under rule 5(2)(b) of the Rules of this Court, section 3A of the *Appellate Jurisdiction Act* and Article 159 of *the Constitution*. The main orders sought in the application are that pending the hearing and determination of this application, there be a stay of execution of the judgment and decree delivered in Milimani High Court Income Tax Appeal No. E215 of 2023 on 14th November 2025
2. The background of this application is that the respondent issued the applicant with a tax assessment on 4th February 2022. The applicant objected to the assessment and the respondent issued an objection decision on 28th April 2022 confirming a tax demand of Kshs. 2,521,185,943. The applicant appealed to the Tax Appeals Tribunal which on 10th November 2023, upheld the respondent's decision. A further appeal to the High Court in Income Tax Appeal No. E215 of 2023 was dismissed on 14th November 2025, thereby affirming the Tribunal's findings. Aggrieved by that decision, the applicant lodged a notice of appeal to this Court dated 20th November 2025 and now seeks a stay of execution pending the intended appeal.
3. In the application, and in the supporting affidavit sworn by Hurley Doddy, the applicant's director, the applicant asserts that the intended appeal is not frivolous and raises substantial questions of law.



The grounds in support of this limb and which are replicated in the draft memorandum of appeal annexed to the application are, inter alia, that the learned judge erred in law and in fact by allowing the respondent to sanction illegal collection of taxes contrary to Article 210 of *the Constitution* of Kenya 2010; disregarding the doctrine of separate corporate personality as set out in *Salomon v Salomon & Co Ltd* [1897] AC 22 HL; failing to recognize that the respondent's tax demand was premised on the entire gross revenue earned by ECP Manager, ECP Manager III LP and ECP Mena Management LP (together the ECP Group) instead of assessing taxes on the relevant profits attributable to the applicant, thereby subjecting to tax income that was neither derived nor accrued in Kenya contrary to section 3(1) of the *Income Tax Act* (Cap 470); misapplying and misinterpreting section 3(1) of the *Income Tax Act*; and making conclusions that were contrary to the evidence presented.

4. On the nugatory aspect, the applicant asserts that unless a stay is granted, the respondent is likely to proceed with enforcement measures including immediate demand and recovery of the sum of Kshs. 2,521,185,943 as well as issuance of agency notices to third parties. It is contended that payment of such a colossal sum would occasion severe financial hardship, potentially rendering the applicant insolvent, crippling its operations, and impairing its ability to meet contractual obligations. The applicant further contends that even if the intended appeal were to succeed, the damage suffered would be irreparable and the success rendered pyrrhic. It is also contended that the respondent would suffer no prejudice if stay is granted as it would still be able to recover the taxes should the appeal fail.
5. The respondent opposes the application through the replying affidavit sworn by Timothy Nthuku, an officer of the Kenya Revenue Authority. He depones that the applicant has not demonstrated the existence of an arguable appeal. He contends that the High Court in its judgment comprehensively addressed all issues raised including the factual basis of the assessment, the applicable transfer pricing principles, and the statutory burden of proof. Further, the High Court concurred with the Tax Appeals Tribunal resulting in concurrent findings of fact by two competent judicial levels which findings have not been shown to be perverse, unreasonable, or based on any error of law. The respondent maintains that the applicant has not identified any specific misdirection or error capable of sustaining a bona fide arguable appeal and that mere dissatisfaction with the outcome does not suffice.
6. On whether the appeal would be rendered nugatory if the orders sought herein are not granted, the respondent avers that the applicant has equally failed to discharge this limb. It is contended that the tax liability relates to the period 2016 to 2020 and has long been within the applicant's knowledge, and that the High Court in its judgment did not impose any new or unexpected obligation but merely affirmed an existing assessment. The respondent further avers that the applicant remains a going concern and has not placed before the Court any credible evidence, such as audited accounts or bank statements, to demonstrate that payment of the assessed tax would occasion insolvency or irreparable harm.
7. The respondent further contends that the applicant ought to have put in place contingency measures since the issuance of the assessment in 2022 and that the tax demanded represents a lawful corporation tax obligation. It is also deponed that payment of a lawfully assessed tax does not render an appeal nugatory particularly where the taxpayer continues to operate and, in any event, there exists a statutory refund mechanism under the *Tax Procedures Act* through which any overpaid or unlawfully collected tax may be refunded or credited. The respondent affirms its capacity to comply with any such refund should the intended appeal succeed.
8. On security, it is deponed that the applicant has not proposed any form of security for the due performance of the decree. It is the contention of the respondent that, in the alternative and without prejudice, any grant of stay should be conditional upon the applicant providing security equivalent to at least 50% of the decretal sum given the magnitude of the tax involved and the public interest in revenue collection. The respondent further invokes Articles 201 and 210 of *the Constitution*



emphasizing that payment of taxes is a constitutional obligation and that delay in collection prejudices public interest by undermining funding for public services.

9. Through a further affidavit sworn by Hurley Doddy, the applicant maintains that compelling it to pay the assessed tax would occasion unbearable financial hardship. It is deponed that, contrary to the respondent's assertion that the applicant is a going concern, the applicant is in serious financial distress and has already commenced insolvency proceedings in Milimani Insolvency Petition No. E063 of 2025, a fact said to be well within the respondent's knowledge. In support of this position, the deponent annexes the applicant's audited financial statements for the year 2023 which are said to demonstrate that the company is not a going concern and which have also been filed in the insolvency proceedings. It is further averred that the respondent is actively participating in those insolvency proceedings, having filed responses and submissions therein, and that judgment in the insolvency matter is slated for 5th March 2026 (now past).
10. The deponent further asserts that, in light of the applicant's financial constraints and ongoing insolvency process, it is not in a position to furnish security equivalent to 50% of the assessed tax as proposed by the respondent. Emphasis is placed on the magnitude of the tax assessment, which is described as enormous, and this Court is therefore urged to safeguard the applicant's position pending the hearing and determination of the intended appeal.
11. At the hearing of this application, learned counsel Mr. Nyaundi appeared for the applicant while the respondent was represented by learned counsel Ms. Almadi. On whether the intended appeal is arguable, Ms. Almadi conceded (rightly in our view) that the intended appeal was arguable and did not contest that limb.
12. On the nugatory aspect, Counsel for the applicant contended that enforcement of the tax demand of approximately Kshs. 2.5 billion would cause severe financial hardship, reiterating that the assessment is disputed as it relates to income allegedly earned by separate foreign entities and not the applicant, and that the applicant is already facing insolvency proceedings and is unable to raise any meaningful security.
13. In response, counsel for the respondent maintained that the tax liability comprises a lawful assessment equivalent to about 30% of the applicant's income, has been upheld by two courts, and that payment would not render the appeal nugatory given that the applicant is a going concern and that any overpayment could be refunded. She further urged that any stay, if granted, should be conditional upon payment of at least 30% of the decretal sum.
14. The Court engaged both parties on the applicant's financial position, the likely effect of immediate enforcement, and whether security should be provided, noting that no proposal for security had been made despite the application relating to a substantial monetary decree. In that context, it is to be expected that an applicant seeking stay pending appeal such as in this case would readily provide security, quite often in the form of a deposit of a reasonable portion of the decretal amount. However, and although the respondent expressed willingness to accept a reduced sum of 30% of the assessed tax as security, the applicant was unable to commit to any payment or offer an alternative. Counsel indicated that he had no instructions on the issue and that the client was not in a position to provide any security.
15. We have considered the application, the affidavits, the rival submissions and the law. It is trite law that in applications of this nature, the applicant must demonstrate, first, that the intended appeal is arguable, and secondly, that unless the orders sought are granted, the appeal will be rendered nugatory. See *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR.



16. On the first limb, there is little controversy. Counsel for the respondent properly conceded that the intended appeal raises arguable points. In any event, the grounds set out in the draft memorandum of appeal raise weighty questions touching on the proper interpretation and application of section 3(1) of the *Income Tax Act*, the doctrine of separate corporate personality, and the legality of taxing income allegedly earned by entities distinct from the applicant. These are not idle issues. They are bona fide issues deserving consideration by this Court. It is settled that an arguable appeal need not succeed but must raise at least one bona fide issue that merits consideration on appeal. In the circumstances, that limb is satisfied.
17. On the nugatory aspect, the key question is whether, absent stay, the appeal would be rendered worthless. The decretal sum is Kshs. 2,521,185,943. While it is settled that execution of a monetary decree does not, of itself, render an appeal nugatory, that principle is not absolute. This Court takes the view that it must consider whether the respondent is in a position to refund the decretal sum and whether payment would occasion undue hardship to the applicant. See *Safaricom PLC v Laiser Communications Limited & 4 others* [2022] KECA 800 (KLR). In the present case, the applicant has placed material before this Court showing that it is in financial distress and is subject to ongoing insolvency proceedings. Therefore, immediate enforcement particularly through agency notices would likely cripple its operations and occasion disproportionate hardship. In those circumstances, there is a real risk that the appeal would be rendered nugatory.
18. That said, this is a money decree, and this Court must strike a balance between the competing interests of the parties. On the one hand, the applicant seeks to preserve the status quo as it navigates the process of appeal; on the other hand, the respondent holds a decree and is eager to enjoy the fruits thereof. The applicant has not made matters any easier by failing to offer any security. This Court is mindful of the substantial sums involved and the applicant's demonstrated financial constraints, including the material disclosed in the further affidavit and the ongoing insolvency proceedings. In those circumstances, the Court must calibrate the appropriate level of security so as to remain fair and practicable. Having done so, we find the respondent's proposal of payment of 30% of the assessed tax as security is as reasonable.
19. In the circumstances, the appropriate order which commends itself to us is a conditional stay on what, in our view, are modest and realistic terms to both parties. We hereby order that the applicant shall deposit a sum equivalent to 30% of the decretal amount in an interest-earning account in the joint names of counsel for the parties or in the alternative, furnish a bank guarantee for the same amount from a reputable financial institution, within sixty (60) days hereof, failing which the stay shall lapse automatically. The costs of this application shall abide the outcome of the intended appeal. We further direct that the appeal, if already filed, be heard on a priority basis.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2026.

JOEL NGUGI

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JUDGE OF APPEAL

PAUL LILAN

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JUDGE OF APPEAL

MUNYAO SILA



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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

