

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM MISC. APP. NO. E345 OF 2025

WEIHAI INTERNATIONAL ECONOMIC &
TECHNICAL COOPERATIVE COMPANY LIMITED.....APPLICANT
-VERSUS-
COMMISSIONER OF DOMESTIC AXES.....RESPONDENT

RULING

1. Before me is a Notice of Motion application erroneously dated 24th March 2024 and filed on 25th March 2025 by the applicant under the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 42 Rule 6 & Order 51, Rules 1 & 3 of the Civil Procedure Rules, 2010, Section 42(14)(e) of the Tax Procedures Act and all other enabling provisions of the law. The applicant seeks orders for the unconditional lifting and setting aside of the respondent's Agency Notice dated 21st March 2025 issued to the Kenya National Highways Authority and an order for stay of execution of the Judgment of the Tax Appeals Tribunal in TAT E789 of 2023 dated 28th February 2025, with any subsequent Agency Notices arising therefrom, pending the hearing and determination of the intended appeal to the High Court.
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. He Kai, a Director of the applicant company. He averred that the Tax Appeals Tribunal delivered its Judgment on 28th February 2025 in Tax Appeal No. E789 of 2023, and that

shortly thereafter, on 21st March 2025, the respondent issued Agency Notices to the Kenya National Highways Authority. He contended that the issuance of the said Notices occurred within the statutory 30-day period allowed for lodging an appeal under Section 32(1) of the Tax Appeals Tribunal Act and that the applicant had already filed a Notice of Appeal on 24th March 2025, thereby signifying its intention to challenge the said Judgment. He deposed that the respondent's actions have frustrated the applicant's statutory right of appeal and violated its entitlement to an automatic stay of execution under Section 42(14) (e) of the Tax Procedures Act.

3. Mr. Kai asserted that unless the orders being sought herein are granted, the applicant stands to suffer substantial and irreparable loss, including loss of income, reputational damage, and undue hardship in recovering any sums paid under the disputed tax assessment due to onerous refund procedures. He averred that the intended appeal is arguable and meritorious, particularly on the ground that the respondent's objection decision was issued outside the statutory timeline, rendering the objection being deemed as allowed by operation of the law. He claimed that the impugned tax assessment amounts to Kshs.2,740,474,370.00, which is grossly disproportionate to the applicant's financial position, as reflected in its audited income of Kshs.347,556,516.00, and poses a serious threat to its continued operations. He stated that enforcement of the Judgment and Agency Notices would cripple the applicant's cash flow and effectively render it incapable of carrying on business.
4. In opposition to the applicant's application, the respondent filed a replying affidavit sworn on 28th March 2025 by Ms Mercy Mutisya, an Officer of the respondent. She confirmed that the Tax Appeals Tribunal delivered its Judgment on 28th February 2025 in **TAT Appeal No. E789 of 2023**, partially

allowing the applicant's Appeal by setting aside certain VAT assessments while upholding assessments on Income Tax, PAYE, WHT, and VAT for a later period, thereby confirming a tax liability of Kshs.2,740,474,340.00 as due and payable.

5. Ms Mutisya asserted that as the successful party, the respondent is entitled to the fruits of its Judgment and to recover the said amount. She contended that the applicant is a foreign company that has completed its projects in Kenya and is therefore a flight risk, and that lifting the Agency Notices would jeopardize the respondent's ability to recover the taxes if the intended appeal fails. She deposed that although the Court has the discretion to grant orders for stay of the Agency Notices, such discretion must be exercised judiciously and in a manner that does not prejudice the respondent or undermine the public interest in tax collection. She further deposed that the applicant has failed to demonstrate substantial loss or provide evidence thereof, and has not offered any security for the due performance of the decree, which are essential conditions for the grant of stay.
6. Ms. Mutisya stated that the intended appeal is limited to issues of law and that, in the interests of justice, the Court should either decline the stay or order the applicant to deposit 100% of the disputed taxes as security. She maintained that the respondent is capable of refunding any sums paid should the appeal succeed and that failure to collect the taxes would adversely affect government operations and public service delivery. Ms Mutisya emphasized that no prejudice would be occasioned to the applicant in paying the taxes pending appeal, whereas the respondent risks irrecoverable loss of public funds if the Agency Notices are lifted. She also noted that the applicant had neither

demonstrated that the appeal is arguable, nor that the proceedings would be rendered nugatory if stay was denied.

7. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on 22nd July 2025 by the law firm of Dennis Liguyani Advocates, whereas the respondent's submissions were filed by Jackline Mulinge Advocate, on 18th July 2025.
8. Mr. Odhiambo, learned Counsel for the applicant submitted that Section 42(14) (e) of the Tax Procedures Act provides for an automatic stay of enforcement where an appeal has been lodged, thus the respondent is barred from issuing enforcement Notices in such circumstances. He argued that the impugned Agency Notice, having been issued under Section 42(13) of the Tax Procedures Act, is subject to this statutory limitation, and its issuance during the subsistence of the applicant's appeal window and after the filing of **HCOMMITA E002 of 2025**, was improper and intended to confer an unfair advantage upon the respondent. Counsel relied on the case of **Equity Group Holding Limited v Commissioner of Domestic Taxes** [2021] KEHC 25 (KLR), and emphasized that Statutes must be given their plain meaning and interpreted harmoniously. In affirming the applicant's entitlement to an automatic stay, learned Counsel contended that Order 42 Rule 6(1) of the Civil Procedure Rules, 2010, must be read in harmony with Section 42(14)(e) of the Tax Procedures Act.
9. Mr. Odhiambo relied on the case of **James Wangalwa & another v Agnes Naliaka Cheseto** [2012] KEHC 1094 (KLR) and contended that denial of an order for stay of execution would extinguish its accrued statutory right to an automatic stay, a violation that cannot be remedied by damages, particularly as it would arise from the Court's own orders. Counsel asserted that the

application herein was filed without delay, having been lodged within 26 days of the Judgment and within the statutory 30-day appeal period, while the substantive appeal was filed promptly thereafter. Counsel referred to the case of **Anyenda v Simidi & 12 others** [2024] KEELC 4249 (KLR) and submitted that an applicant's willingness to provide security is sufficient, with the nature of such security being at the Court's discretion. He further submitted that the interim orders issued on 26th March 2025, directing that funds held by the Kenya National Highways Authority be preserved pending determination of the intended appeal, constitute adequate security.

10. Ms Mulinge, learned Counsel for the respondent cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010, and the Court of Appeal case of **Butt v Rent Restriction Tribunal** [1979] KECA 22 (KLR), and submitted that the respondent has not made out a case for being granted an order for stay of execution. Counsel cited the Court of Appeal case of **Kenya Shell Limited v Benjamin Karuga Kibiru & another** [1986] KECA 94 (KLR) and further submitted that the Court must balance the applicant's right of appeal against the respondent's right to enjoy the fruits of its Judgment, and that absence of substantial loss renders it unlikely that an appeal would be rendered nugatory. She argued that no appeal has been properly filed as the applicant merely lodged a Notice of Appeal without complying with the provisions of Section 32 of the Tax Appeals Tribunal Act and Rule 3 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015, which require the filing and service of a Memorandum of Appeal within the prescribed timelines.

11. Ms Mulinge further noted that no draft Memorandum of Appeal has been annexed to the application herein to demonstrate an arguable appeal. She contended that the instant application is premature and unmerited, as the

impugned decision is a money decree capable of refund under Section 47 of the Tax Procedures Act, and thus cannot render any appeal nugatory. Counsel cited the case of **Samvir Trustee Limited v Guardian Bank Limited** [2007] KEHC 2438 (KLR) and submitted that the applicant has failed to demonstrate such loss, and that execution through Agency Notices is a lawful process that does not in itself, amount to substantial loss.

12. Counsel maintained that the respondent stands to suffer greater prejudice if stay is granted, given that the applicant is a foreign entity that has wound up its operations in Kenya and poses a flight risk, thereby jeopardizing recovery of public funds. She emphasized that the respondent has the capacity to refund any sums paid should the appeal succeed. Ms. Mulinge relied on the case of **Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd** [2019] KEHC 7586 (KLR), and contended that the applicant has neither offered nor demonstrated willingness to provide security. She urged the Court, if inclined to grant stay, to order deposit of 100% of the decretal sum as security, due to the applicant's lack of assets and operations within the jurisdiction.

ANALYSIS AND DETERMINATION.

13. Upon consideration of the application herein, 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 Agency Notice dated 21st March 2025 issued to the Kenya National Highways Authority was properly issued; and**
- ii) Whether an order for stay of execution should issue.**

Whether the Agency Notice dated 21st March 2025 issued to the Kenya National Highways Authority was properly issued.

14. The applicant's case is that the Agency Notice issued by the respondent pursuant to the provisions of Section 42(13) of the Tax Procedures Act was unlawful, as it offended the provisions of Section 42(14)(e) of the Act, which bars the Commissioner from issuing such enforcement Notices where an appeal has been lodged. The applicant averred that the impugned Notice was issued within the statutory 30-day window provided for under Section 32(1) of the Tax Appeals Tribunal Act and that it had filed a Notice of Appeal on 24th March 2025, thereby triggering the statutory protection of an automatic stay.
15. The respondent on the other hand asserted that the applicant had not complied with the legal requirements for instituting an appeal, and more specifically, the filing of a Memorandum of Appeal within the prescribed timelines under Rule 3 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015. The respondent contended that in the absence of a properly instituted appeal, the statutory protection under Section 42(14)(e) was not available to the applicant.
16. It is not in contest that on 28th February 2025, the Tax Appeals Tribunal delivered its Judgment in Tax Appeal No. E789 of 2023, in which it partially allowed the applicant's appeal. In that decision, the Tribunal set aside VAT assessments for the period prior to March 2018, but upheld those relating to April 2018 onwards. The Tribunal further upheld the respondent's assessments in respect of Income Tax, PAYE, and WHT, thereby confirming a total sum of Kshs.2,740,474,340.00 as due and payable by the applicant to the respondent. Dissatisfied with the said Judgment, the applicant lodged a Notice of Appeal dated 24th March 2025.

17. Appeals from decisions of the Tax Appeals Tribunal to the High Court are provided for under Section 32 of the Tax Appeals Tribunal Act, which states as follows –

1) A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.

1A) A party that has appealed against the decision of the Tribunal in subsection (1) shall within two days of lodging a notice of appeal, serve a copy of the notice on the other party.

2) The High Court shall hear appeals made under this section in accordance with rules set out by the Chief Justice.

18. From the foregoing provisions, it is evident that an aggrieved party intending to appeal against a decision of the Tax Appeals Tribunal to the High Court is required to file a Notice of Appeal within thirty (30) days from the date of notification of the decision. In this case, given that the Tribunal's Judgment was delivered on 28th February 2025, the applicant was required to lodge its Notice of Appeal on or before 30th March 2025. Accordingly, having filed the Notice of Appeal on 24th March 2025, this Court finds that the applicant was well within the prescribed statutory period and complied with the provisions of Section 32(1) of the Tax Appeals Tribunal Act.

19. In light of the above, and the fact that the impugned Agency Notice was issued on 21st March 2025, this Court is satisfied that the said Agency Notice was issued before the expiry of the statutory period for filing a Notice of Appeal, a Memorandum of Appeal and a Record of Appeal against the Tax Appeals Tribunal's Judgment. Section 42(14)(e) of the Tax Procedures Act, which has been extensively cited by both parties, states that -

The Commissioner shall not issue a notice under this section unless -

- a) the taxpayer or the non-resident person who is subject to tax in Kenya has defaulted in paying an instalment under section 33 (2);***
- b) the Commissioner has raised an assessment and the taxpayer or the non-resident person who is subject to tax in Kenya has not objected to or challenged the validity of the assessment within the prescribed period;***
- c) the taxpayer or the non-resident person who is subject to tax in Kenya has not appealed against an assessment specified in an objection decision within the prescribed timelines;***
- d) the taxpayer or the non-resident person who is subject to tax in Kenya has made a self-assessment and submitted a return but has not paid the taxes due before the due date lapsed; or***
- e) the taxpayer has not appealed against an assessment specified in a decision of the Tribunal or court.***

20. This Court notes that although Section 42(14)(e) of the Tax Procedures Act had been deleted by the New Finance Act, the Finance Act, No. 4 of 2023 under section 57 provides that -

Section 42 of the Tax Procedures Act, 2015, is amended by deleting subsection (14) and substituting therefor the following new subsection -

- (14) The Commissioner shall not issue a notice under this section unless -***
- a) the taxpayer has defaulted in paying an instalment under section 33(2);***
 - b) the Commissioner has raised an assessment and the taxpayer has not objected to or challenged the validity of the assessment within the prescribed period;***
 - c) the taxpayer has not appealed against an assessment specified in an objection decision within the prescribed timelines;***

- d) the taxpayer has made a self-assessment and submitted a return but has not paid the taxes due before the due date lapsed; or*
- e) the taxpayer has not appealed against an assessment specified in a decision of the Tribunal or court. (Emphasis added).*

21. Accordingly, this Court finds that Section 42(14)(e) of the Tax Procedures Act prohibits and restricts the respondent from issuing demands, notices, or undertaking any recovery measures before the lapse of the statutory period for the filing of an appeal, or where a valid appeal has already been lodged. Notably, the said provisions do not require the filing of a Memorandum of Appeal or Record of Appeal in order for a party to benefit from its protection. The filing of a Notice of Appeal is sufficient. In this case, having established that the impugned Agency Notice was issued prior to the expiry of the statutory period for lodging of an appeal against the Judgment of the Tax Appeals Tribunal, it is my finding that the said Agency Notice was issued prematurely and in contravention of Section 42(14)(e) of the Tax Procedures Act.

22. Consequently, this Court finds that the Agency Notice dated 21st March 2025 issued to the Kenya National Highways Authority was issued irregularly and it is therefore null, void and of no legal effect.

Whether an order for stay of execution should issue.

23. The principles that govern the grant of an order for stay of execution pending appeal are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules, 2010, which states as follows -

No order for stay of execution shall be made under sub rule (1) 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.”***

24. In determining an application for stay of execution pending appeal, Courts are under a duty to balance the competing interests of the parties, while taking into account the fact that an appellant has an undoubted right of appeal, whereas the respondent has a decree which he should not be obstructed from executing unless there is a good reason. In the case of **Vishram Ravji Halai v Thornton & Turpin** [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 Rule 6 of the Civil Procedure Rules, 2010, is fettered by three conditions namely –

- i) establishment of a sufficient cause;***
- ii) satisfaction of substantial loss; and***
- iii) the furnishing of security.***

25. In the case of **James Wangalwa & another v Agnes Naliaka Cheseto** (supra), the Court in determining an application for stay of execution held that –

Sufficient cause being a technical as well as legal requirement will depend entirely on the Applicant satisfying the court that:

- a) Substantial loss may result to the applicant unless the order is made,***
- b) The application has been made without unreasonable delay, and***

c) Such security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.

26. It is noteworthy from the Court record that although the applicant filed a timely Notice of Appeal within the statutory period prescribed under Section 32(1) of the Tax Appeals Tribunal Act, it has not demonstrated compliance with Rule 3 of the Tax Appeals Tribunal (Appeals to the High Court) Rules, 2015, by filing a Memorandum of Appeal within the timelines prescribed thereunder. As such, the applicant's substantive grounds of appeal remain unknown. Rule 3 states that-

The appellant shall, within thirty days, after the date of service of a notice of appeal under section 32(1), file a memorandum of appeal with the Registrar and serve a copy on the respondent.

27. The absence of a filed Memorandum of Appeal prevents this Court from evaluating the merits of the intended appeal. Without knowledge of the substantive grounds of appeal, this Court cannot determine whether the applicant stands to suffer substantial loss should execution of the decree proceed. The requirement to show substantial loss is not met merely by asserting financial harm or inconvenience, the applicant must demonstrate that the pending appeal has a reasonable prospect of success such that denial of stay of execution, would render the appeal effectively nugatory. In this case, the failure to lodge a Memorandum of Appeal precludes such an assessment.

28. Given that the applicant has not successfully instituted an appeal through the filing of a Memorandum of Appeal, this Court finds that there is no basis to consider the prayer for stay of execution pending appeal as Court orders are not issued in vain. In the absence of a pending appeal capable of triggering statutory protection, there is no justification to interrogate the merits or demerits

of the request for stay of execution. The application for stay of execution is therefore premature and cannot succeed.

29. In the result, this Court finds that the instant application is partly successful and is allowed in the following terms -

- i) The respondent's Agency Notice dated 21st March 2025 issued to the Kenya National Highways Authority is hereby unconditionally lifted and set aside; and**
- ii) Each party shall bear its own costs, as the applicant is partly successful.**

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 24TH day of APRIL 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Liguyani for the applicant

Ms Mulinge for the respondent

Mr. Muthomi – Court Assistant.