



REPUBLIC OF KENYA



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Bildin Company Limited v Commissioner of Domestic Taxes (Civil Application E339 of 2024) [2025] KECA 360 (KLR) (28 February 2025) (Ruling)

Neutral citation: [2025] KECA 360 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E339 OF 2024
F TUIYOTT, P NYAMWEYA & FA OCHIENG, JJA
FEBRUARY 28, 2025**

BETWEEN

BILDIN COMPANY LIMITED APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(An application for an injunction pending hearing and determination of an appeal from the judgment of the High Court of Kenya at Nairobi (A. Ong'inyo, J.) dated 30th May 2024 in Commercial Tax Appeal No. E116 of 2023)

RULING

1. The applicant, Bildin Company Limited, being dissatisfied with the judgment of the High Court at Nairobi delivered on 30th May 2024 in Commercial Tax Appeal NO. E116 of 2023, intends to appeal against the said judgment vide a notice of appeal lodged on 4th June 2024. In the meantime, the applicant has filed the notice of motion dated 13th June 2024 under sections 3, 3A & 3B of the [Appellate Jurisdiction Act](#) and Rules 5(2)(b) 44 & 45 of the Court of Appeal Rules in which he seeks the following orders:

- a) Spent.
- b. Spent.
- c. A temporary injunction be issued barring, restraining, and stopping the respondent from enforcing the collection of taxes claimed in the sum of Kshs. 460,866,860 in any manner whatsoever pending the hearing and determination of the appeal.
- b. Spent.



- c. A temporary injunction be issued barring, restraining, and stopping the respondent from attaching any monies or funds of the applicant or those held in its account or for its benefit, or taking any other form of enforcement action or issuing agency notices to any bank where the applicant holds a bank account pending the hearing and determination of the appeal.
 - d. Costs of the application.”
2. The application is premised on the grounds that:
 - a. The notice of appeal was filed within the requisite timelines.
 - b. If the orders sought are not granted the respondent will proceed to execute and enforce the collection of the impugned colossal tax of Kshs. 460,866,860.
 - c. The intended appeal is arguable and it will be rendered nugatory if an injunctive order is not granted.
 - d. The applicant will be greatly prejudiced and suffer harm if the respondent executes the decree.
 - e. It is in the interest of justice that the application is allowed.
3. The application is further supported by the affidavit of Kenneth Kithinji, counsel for the applicant, sworn on 3rd July 2024. The deponent reiterated the grounds on the face of the application, and annexed a draft memorandum of appeal.
4. In response, the respondent through the affidavit of Judith Mulimba, sworn on 18th September 2024, stated that:
 - a. In the judgment dated 14th July 2023, the Tax Appeals Tribunal dismissed the applicant’s appeal while upholding the respondent’s objection dated 21st February 2022 for principal taxes of Kshs. 321,337,334.
 - b. The applicant appealed to the High Court and was also granted a stay of execution on condition that they pay the respondent Kshs. 20,000,000 within 30 days but failed to comply.
 - c. The applicant has enjoyed goodwill and stay of execution for over 2 years since the matter was filed on 14th March 2022.
 - d. The applicant has not demonstrated through financial statements, bank balances, or evidence of their current financial status, the substantial loss they will suffer if an injunction is not granted.
 - e. The respondent stands prejudiced on account of any further delay in the collection of taxes due to lack of sufficient funding by the government, which is a matter of public interest.
 - f. If the orders sought are granted, the respondent risks not being able to recover the outstanding taxes if no security is provided.
 - g. The applicant has not demonstrated that they will be unable to recover the decretal sum from the respondent if the appeal is successful. The respondent is capable of reimbursing the applicant being the principal revenue collecting agency and by virtue of Section 47 of the [*Tax Procedures Act*](#).



5. In response to the respondent's replying affidavit, the applicant filed a further affidavit sworn on 20th September 2024, by Abdirahman Diriye Dinih, the director of the applicant, in which it was averred that the grant of temporary stay orders at the High Court and at the Court of Appeal are different legal and judicial processes, and the proposition by the respondent for security to tendered is without basis in law and will have the effect of locking the applicant out of the seat of justice.
6. At the hearing of the application on 24th September 2024, learned counsel Mr. Kithinji, appeared for the applicant, while Mr. Ibrahim Said appeared for the respondent. Parties relied on their respective written submissions which they orally highlighted.
7. Mr. Kithinji submitted that the applicant had demonstrated through the two affidavits that they had an arguable appeal, particularly with regard to the respondent's objection decision which they allege was rendered more than 60 days from the date of the applicant's objection. In addition, given that the timelines are couched in mandatory terms and by law, the objection was deemed to be allowed. The applicant further submitted that they will be challenging the failure of the High Court to hold that the tax assessment by the respondent was grossly erroneous, wrong, without basis, and violated Article 47 of *the Constitution*.

On whether the appeal would be rendered nugatory if the respondent proceeded to enforce the impugned tax amounts of Kshs. 460 million, counsel submitted that the applicant would be severely prejudiced as this would lead to its closing down.
8. Counsel also submitted against the requirement for security stating that the subject matter of the appeal relates to tax assessment of over seven financial years based on gross amounts and being asked to deposit security would amount to locking the applicant out of the seat of justice. Counsel informed the court that it would be difficult for him to secure his client's instructions on security.
9. In their written submissions, the applicant relied on the cases of Trust Bank Limited & Another v Investech Bank Limited & 3 Others [2000] eKLR, NIC Bank Limited & 2 Others v Mombasa Water Products Limited [2021] eKLR, and Fred Okengo Matiang'I & 6 Others v Miguna Miguna; KNHRC & Another (Interested Parties) [2021] eKLR, when outlining the principles for grant of stay of execution.
10. Opposing the application, Mr. Said submitted that the High Court granted the applicant a conditional stay on 14th December 2023, directing the applicant to provide security of Kshs. 20 million. However, the applicant has not paid the same and the court should take note that the applicant is a habitual offender when it comes to complying with court orders. Counsel submitted that this is a money decree and the respondent is apprehensive that if the court grants a stay without any security for taxes, the applicant will only buy more time to close shop without paying the taxes due.
11. Counsel urged that if the court is inclined to grant the stay, then the court should direct that the applicant abides by the High Court orders with regard to payment of Kshs. 20 million as security, and deposit the entire amount with the court. To buttress this submission, the respondent relied on the case of Caltex Oil (K) Limited v Evanson Njiiiri Wanjihia [2009] eKLR.
12. In its written submissions, the respondent relied on the case of Commissioner of Customs v Amit Doshi [2007] eKLR in which the court determined that for an intended appeal to be arguable, all that is needed in law is that there be even one arguable point. The respondent pointed out that the grounds set out by the applicant contravene Section 56(2) of the *Tax Procedures Act* and therefore, no arguable point of law has been raised in the intended appeal.



The respondent further submitted that the appeal would not be rendered nugatory as the respondent has an effective mechanism in place if the tax demanded is found not to be due, the same would be refunded to the applicant in accordance with Section 47 of the *Tax Procedures Act*. Lastly, while citing the case of *Coastal Bottlers Limited v The Commissioner of Domestic Taxes*, CA 91 O of 2008 (UR 53/2008), the respondent submitted that the applicant had not demonstrated through documentation that they would suffer irreparable harm.

13. We have carefully considered the application, the grounds in support thereof, the various affidavits by the parties, submissions by counsel, the authorities cited, and the law. The issue for determination is whether or not the application has met the threshold for grant of the orders sought under Rule 5(2) (b) of the Court of Appeal Rules.
14. The jurisdiction of this Court under Rule 5(2)(b) is original, independent, and discretionary. However, we must exercise this discretion judiciously and rationally, and not out of impulsiveness or sympathy.
15. Rule 5(2)(b) is a procedural provision that allows the court to protect the subject matter of an appeal when it has already been filed. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR, the court held that:
 - i) In dealing with Rule 5(2) (b) the court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this court. See *Ruben & 9 Others v Nderitu & Another* (1989) KLR 459.
 - ii. The discretion of this court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
 - iii. The court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. *Halai & Another v Thornton & Turpin* (1963) Ltd. (1990) KLR 365.
 - iv. In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No. Nai 189 of 2001.
 - v. An applicant must satisfy the court on both of the twin principles.
 - vi. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
 - vii. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.
 - viii. In considering an application brought under Rule 5 (2) (b) the court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. *Damji Pragji* (supra).



- ix. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
 - x. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.
 - xi. Where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impecunity, the onus shifts to the latter to rebut by evidence the claim. *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”
16. It is trite that the applicant must prove that there is an arguable appeal, that is, the appeal is not frivolous, and upon satisfying that principle, the applicant has the additional duty to demonstrate that the appeal if successful, would be rendered nugatory should the orders sought not be granted. In the case of *Dennis Mogambi Mang’are v Attorney General & 3 Others*, Civil Application No. NAI 265 of 2011 (UR 175/2011), the court held that whether the appeal or the intended appeal is arguable or not, does not mean that the appeal or intended appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court.
17. The applicant has challenged the respondent’s tax assessment and also raised the issue regarding their objection being determined after 60 days, which is outside the prescribed timelines. During the hearing, the court sought to know when the 60-day timelines started running. Both the applicant and the respondent had a different argument on when time started running. Therefore, we find that this issue and the other issues raised, in the applicant’s draft memorandum of appeal as regards the assessment of its tax liability will require a full hearing to be effectively determined. We therefore find that the applicant has satisfied the limb of having an arguable appeal.
18. As to whether the intended appeal will be rendered nugatory, it is trite that the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case.
- In doing so, the court is bound to consider the conflicting claims of both sides. It is not in dispute that the amount claimed in taxes is Kshs. 460 million. This is a colossal amount. The respondent has pointed out that it has a mechanism in place to refund the amount in the event the appeal is successful. The applicant on the other hand stated that remitting the amount would lead to their winding up.
19. Given the huge sum of money involved, it is our considered view that any company in such a position will most likely suffer harm in the event they were asked to pay such an amount, especially where the said amount is contested. In the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] E.A. 227, this Court stated that:
20. In the circumstances, although the issue revolves around a money decree, we are persuaded that depositing an amount of over Kshs. 400 million will have an impact on the day-to-day running of the applicant company. However, due to the huge sum of money involved and the hardships likely to be suffered by both parties, we find it prudent to issue a conditional injunction. Our said decision is in tandem with the decision of this Court in the case of *Caltex Oil (Kenya) Ltd v Evanson Njiiri Wanjihia*, (supra), which it was held as follows:

“With the above observations in view, we think that when the hardships of both parties are put on the balance, the respondent might suffer greater hardship than the applicant unless the court makes an appropriate order to prevent any undue hardship.



In the circumstances, we think the balance of convenience favours the respondent. We are therefore inclined to grant a conditional stay on terms.

Before we set out the terms of the conditional stay it is important to state that in our view the latitude of the Court has recently been considerably extended by the incorporation of Sections 3 A and 3 B of the Appellate Jurisdiction Act Cap 9 on overriding objective by the Statute Law (Miscellaneous Amendment) Act No. 6 of 2009.

Although the overriding objective has several aims the principal aim is for the Court to act justly in every situation either when interpreting the law or in exercising its powers. The provision came into operation on 23rd July, 2009 and it is our view that by striking the balance as set out above we have also given effect to the overriding objective taking into account the special circumstances of the matter before us.

All in all we consider that a conditional stay would serve the interests of both parties.

We accordingly grant a conditional stay of execution on condition that the applicant deposits within 45 days from the date hereof the sum of Kshs.15,000,000/= (inclusive of the Kshs.3,000,000/= deposit previously covered by the consent order) in a joint account in the name of the advocates' firms representing both parties and such an account to be an interest earning account to be maintained as such until the appeal is determined or upon further orders of the Court. In default, the application for stay to automatically stand dismissed. It is so ordered.”

21. In the result, we grant a temporary injunction restraining the respondent from enforcing the collection of taxes claimed from the applicant in the sum of Kshs. 460,866,860 in any manner, on condition that the applicant deposits the sum of Kshs. 30 million in Court within 90 days. Upon default, the application will automatically stand dismissed. The costs of the application shall abide the outcome of the appeal.
22. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

F. TUIYOTT

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

