



**Kidero v Commissioner, Investigations & Enforcement (Civil Application E082 of 2022) [2025] KECA 260 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KECA 260 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E082 OF 2022  
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA  
FEBRUARY 21, 2025**

**BETWEEN**

**EVANS ODHIAMBO KIDERO ..... APPLICANT**

**AND**

**COMMISSIONER, INVESTIGATIONS & ENFORCEMENT ..... RESPONDENT**

*(Application for stay of execution pending the hearing and determination of appeal against the Judgment and Decree of the High Court of Kenya at Nairobi (Majanja, J.) dated 4th February 2022 in HC ITA No. E028 of 2020)*

**RULING**

1. Before the Court is a notice of motion dated 15<sup>th</sup> March 2022 taken out by Evans Odhiambo Kidero (the applicant) in which he seeks an order to stay execution of the judgment and decree of the High Court of Kenya at Nairobi (Majanja, J.) dated 4<sup>th</sup> March 2022, pending the hearing and determination of Civil Appeal No. E066 of 2022, Evans Odhiambo Kidero v. Commissioner, Investigations and Enforcement, which he has already filed in this Court. By the impugned judgment, the High Court allowed an appeal by the Commissioner, Investigations & Enforcement (the respondent), and reversed the decision of the Income Tax Appeals Tribunal (the tribunal) dated 21<sup>st</sup> December 2016, thus making the applicant liable to pay tax assessed by the respondent at Kshs. 427,269,795.
2. There is a related application, namely, Civil Application No. Nai E083 of 2022, Evans Odhiambo Kidero v Commissioner of Investigations and Enforcement between the same parties and arising from a ruling of the High Court in the same matter. In that application, the applicant seeks an order of stay of execution of the ruling of the High Court dated 7<sup>th</sup> March 2022, which granted him a conditional stay of execution on terms that he considers onerous and an hinderance to his right of appeal and access to justice.



3. Although the two applications were not consolidated and were heard back-to-back, to the extent that they are between the same parties, arise from decisions of the High Court in the same matter, and essentially raised the same issues, it is more convenient to consider the two together. Accordingly, this ruling will apply mutatis mutandis to Civil Application No. Nai E083 of 2022, *Evans Odhiambo Kidero v Commissioner of Investigation and Enforcement*.
4. The brief background to the application is as follows. After auditing the applicant's business and financial affairs for the period between January 2011 and December 2015, the respondent, by a letter dated 4<sup>th</sup> October 2016, assessed the applicant's tax liability at Kshs. 680,903,503.00, inclusive of penalties and interest. On 26<sup>th</sup> October 2016, the applicant objected to the assessment and, on 21<sup>st</sup> December 2016, the respondent reviewed the assessment downwards to Kshs. 427,269,795.00. The respondent disallowed Kshs. 423,000,000.00, which the applicant contended constituted political campaign donations, on the grounds that the applicant did not provide the breakdown on how and when the amount was banked in his personal accounts.
5. In addition, the respondent added a Kshs 74,000,000.00 charge as constituting undisclosed income for one of the applicant's properties known as Vista Investments Ltd. The applicant explained that the property was acquired vide a Kshs. 62,000,000.00 loan from Family Bank and a Kshs. 14,000,000.00 shareholder's loan from Gem Apartments, Ltd., but the respondent rejected the explanation on the grounds of lack of supporting documents.
6. The applicant was aggrieved and lodged an appeal in the tribunal, which, by a judgment dated 6<sup>th</sup> March 2020, allowed the appeal. The respondent was aggrieved and appeal to the High Court, which appeal yielded the judgment we have already referred to, reversing the decision of the tribunal. Subsequently, on 7<sup>th</sup> March 2022, the High Court granted the applicant a conditional stay of execution, which required him to provide a bank guarantee for Kshs 150,000,000.00 within 45 days.
7. The applicant was in turn aggrieved by the reversal of his fortunes and filed the appeal we have already referred to, followed by the application now before the Court, for an order of stay of execution of the judgment of the High Court pending the hearing of his appeal.
8. In a bid to demonstrate that the pending appeal is arguable, the applicant relied on his affidavit sworn on 15<sup>th</sup> March 2022 and written submission dated 23<sup>rd</sup> March 2022. His learned counsel, Mr. Obuya, referred to the memorandum of appeal and submitted that the appeal raises a multitude of arguable issues, among them being that the High Court erred by subjecting political campaign donations to taxation; by taxing the sum of Kshs. 390,000,000 from L.R No. 241/588 and Rosslyn House No. 4, whilst the respondent had in fact allowed the same and had no claim over it; and by ignoring several errors in the assessment, which the respondent had admitted. Counsel contended that the High Court ended up awarding amounts which the respondent was neither claiming nor entitled to. It was also contended that the order to provide a hefty bank guarantee amounted to denial of the applicant's right of appeal, access to justice and protection of the law, because the amount in the guarantee was influenced by erroneous figures relied upon by the court.
9. As regards the issue as to whether the appeal risked being rendered nugatory, counsel submitted that the agency notice by the respondent for the colossal sums had put the applicant's life and business at a standstill. He added that the applicant was exposed to immense and undue hardship and that, without an order of stay of execution, he would be completely ruined, a situation that would be irreversible if the appeal succeeded.
10. In support of the application, the applicant relied on a number of authorities, among them, *Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others* [2013] eKLR; *Equity Bank Ltd. v. West Link Mbo*



Ltd. [2013] eKLR; Trust Bank Ltd. & Another v. Investech Bank Ltd. & 3 Others [2000] eKLR; and James Wangalwa & another v. Agnes Naliaka Cheseto [2012] eKLR. All these authorities speak to the principles that guide the Court in considering an application under rule 5(2)(b) of the Court of Appeal Rules.

11. The respondent opposed the application relying on a replying affidavit sworn by its employee, Mr. Kennedy Wakoli, on 22<sup>nd</sup> March 2022 and submissions dated 15<sup>th</sup> April 2022. The respondent's learned counsel, Ms. Leparashao, contended that any representations it made to the applicant or any of the applicant's objections that it had allowed in its statement of facts were not relevant to the appeal, because the case before the tribunal was not based on that statement. For that reason, the respondent contended that parties are bound by their pleadings.
12. It was further the respondent's position that the assessed tax was due and payable in law together with the penalties and interest in so far as the applicant had not been granted remission by the National Treasury. It was also contended that the applicant's appeal was not arguable because he had failed to discharge the burden of proof on him to show that all the donations that he received were used to fund his political campaign.
13. On whether the appeal would be rendered nugatory, the respondent submitted that it was not enough for the applicant to claim that he would suffer undue hardship or that his business would be crippled. While agreeing that the amount in dispute was colossal, the respondent contended that the same should be secured because the respondent collects taxes on behalf of the public.
14. The respondent further took issue with the applicant for applying for stay of execution in the High Court and also in this Court, which it labelled forum shopping. It was contended that the law allowed for tax refund and that the respondent was able and willing to refund moneys paid by the applicant in the event that his appeal succeeded. In addition, the respondent claimed it could give the applicant credit for the decretal amount against future taxes should his appeal succeed. The only ground that the respondent was willing to cede was a further conditional order of stay of execution upon the applicant paying 60% of the decretal amount and providing a bank guarantee for the balance.
15. In support of its case, the respondent relied on NIC Bank Ltd. & 2 others v. Mombasa Water Products Ltd. [2021] eKLR; Keroche Breweries Ltd. v Commissioner of Domestic Taxes (*CA No 140 of 2020*); and Nguruman Ltd v Jan Bonde Nielsen & 2 Others [104] eKLR, which again speak to the principles under rule 5(2)(b).
16. We have considered the judgment of the High Court, the application, the respondent's replying affidavit, the submissions by both parties and the authorities cited. Starting with the respondent's contention that the applicant is forum shopping and cannot seek stay of execution in this Court, having already sought the same order in the High Court, we think that is a misapprehension. The jurisdiction of this Court to grant a remedy under rule 5(2) (b) has advisedly been described as "original and discretionary". (See Trust Bank Ltd. & Another v. Investech Bank Ltd. & 3 Others (supra).

What that means is that a party who has unsuccessfully sought an order of stay of execution or is otherwise aggrieved by a decision of the High Court on an application for stay of execution, is not precluded from applying for the same remedy in this Court. Indeed, in Equity Bank Ltd. v. West Link Mbo Ltd. (supra), Githinji, JA explained the issue as follows:

"It is trite law that in dealing with 5 (2) (b) applications the Court exercises discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6(1) of order 42 C.P. Rules and refused, the Court in



dealing with a fresh application still exercises an original independent discretion as opposed to appellate jurisdiction.”

17. Turning to the merits of the application, we bear in mind that an arguable appeal does not have to disclose a multiplicity of arguable issues, and that even a single bona fide issue that deserves to be considered fully by the Court will suffice. (See *Ahmed Musa Ismael v. Kumba ole Ntamorua & 4 Others* [2014] eKLR). Further, the principle is that an arguable appeal need not necessarily succeed when it is heard. (See *Kenya Railways Corporation v. Edermann Properties Ltd.* CA No. Nai 176 of 2012).
18. Looking at the issues that the applicant intends to raise on appeal, we are satisfied that they are not frivolous. At this stage, we are supposed only to consider the draft memorandum of appeal on a prima facie basis. We are not permitted to delve deeper into the issue or to make any definitive finding, even though on a prima facie basis we can still call out a frivolous appeal. The making of definitive findings is the proper jurisdiction of the bench which will ultimately hear the appeal. (See *Stanley Kang'ethe Kinyanjui v. Tony Ketter & 5 Others*).
19. As regards the question as to whether the applicant's appeal risks being rendered nugatory, that depends on the particular circumstances of each case. Sometimes the Court is called upon to bear in mind the respective hardships that each party is likely to face pending the hearing of the appeal. Thus, for example, in *Reliance Bank Ltd v. Norlake Investments Ltd.*[2002] 1 EA 232, the Court held:

“We do not understand the position to be that in a decree for the payment of money, for example, the only thing that would render success of an appeal nugatory is the inability of the other side to refund the decretal sum if it has been paid over to it.”

(See also *Erwen Electronics Ltd & 3 others v. Radio Africa Ltd & Another*, CA. No Nai 82 of 2011 and *Nation Media Group & 2 Others vs John Joseph Kamotho & 3 Others*, CA No. 108 of 2006).
20. In the circumstances of this application, it cannot be just for the respondent to assert that the appeal will not be rendered nugatory because payments made by the applicant could be applied to settle his future tax liability. That amounts to requiring the applicant to pay in advance for future tax liability which is yet to accrue, and which may ultimately not accrue. We also believe that it behoves the respondent to ensure, as much as it is consistent with the law, businesses which pay taxes are not completely crippled, lest it kills all the geese that lay the golden eggs.
21. Taking into account all the circumstances of this application and, in particular, the fact that the appeal is already filed and ripe for hearing and determination, we hereby allow the application and grant an order of stay of execution. The Registrar shall forthwith fast track the appeal, Civil Appeal No. E066 of 2022, *Evans Odhiambo Kidero v. Commissioner, Investigations and Enforcement* for hearing, latest within the next term of the Court. It is so ordered.
22. As earlier pointed out, this ruling will apply, mutatis mutandis to Civil Application No. Nai E083 of 2022, *Evans Odhiambo Kidero v. Commissioner of Investigations and Enforcement*.
23. We sincerely apologise to the parties for the delay in rendering this ruling, which arose from factors beyond the control of the Court.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF FEBRUARY 2025.**

**K. M'INOTI**



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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA, CArb, FCIArb**

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**JUDGE OF APPEAL**

**M. GACHOKA, CArb, FCIArb**

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**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR.**

