



**M'big Limited v BAT Kenya Tobacco Company Limited (Civil Appeal
(Application) E272 of 2024) [2025] KECA 196 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 196 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E272 OF 2024
DK MUSINGA, M NGUGI & GV ODUNGA, JJA
FEBRUARY 7, 2025**

BETWEEN

M'BIG LIMITED APPLICANT

AND

BAT KENYA TOBACCO COMPANY LIMITED RESPONDENT

(An application seeking a temporary stay of execution of the Ruling and Order of the High Court, pending hearing and determination of an intended appeal arising from the High Court of Kenya at Nairobi (Mwita, J.) delivered on 29th September 2023 in Milimani Civil Suit No. E151 of 2022)

RULING

1. Kenneth Munene Chuaga is the Managing Director of M'big Limited, the applicant herein. On 23rd October 2024, the applicant filed a notice of intention to act in person, and Mr. Chuaga indicated that he was appearing as the representative of the applicant. The applicant was formerly represented by Messrs Hammerton Maloba & Co. Advocates.
2. The applicant's notice of motion dated 16th December 2024 seeks stay of execution of a ruling and/or order of Mwita, J. delivered on 29th September 2023 in Milimani High Court Civil Suit No. E151 of 2022 between the parties herein. In that ruling, the applicant was ordered to pay the respondent a sum of Kshs.56,184,300.15 arising from a cigarette distribution agreement that the parties had entered into sometime in June 2015.
3. In the impugned ruling, the trial court established that one of the clauses in the agreement stipulated that in the event of any dispute arising concerning the agreement, either party would serve a written notice on the other party; that the parties would first seek to have the dispute resolved through negotiation; that within 21 days after service of the dispute notice, parties were to meet and try to resolve the same; that if the dispute was not resolved or no meeting held within 30 business days



after service of the dispute notice, the dispute would be referred to arbitration; but the contract was terminated, and the parties held reconciliation meetings with a view to resolving the dispute as to the outstanding sums payable by the applicant, and the amount arrived at was Kshs.56,184,300.15. He further held that the arbitration clause had been varied by consent to give the court jurisdiction to determine the dispute.

4. Being aggrieved by the said ruling, the applicant filed a notice of appeal and subsequently instituted an appeal. The applicant contends that its appeal is arguable. Its memorandum of appeal faults the learned judge for, inter alia: failing to hold that the dispute ought to have been referred to arbitration; failing to grant the applicant leave to file its statement of defence and counter claim, and for condemning the applicant unheard.
5. The applicant stated that execution of the orders issued on 29th September 2023 is imminent as the respondent has commenced the process by seeking a certified copy of the ruling and filing of party and party bill of costs for taxation; that if execution is allowed to proceed, the applicant would suffer substantial loss. He therefore urged this Court to grant the orders sought.
6. Opposing the application, Ms. Muthee, learned counsel for the respondent, submitted, inter alia, that the amount that is due and payable by the applicant to the respondent was arrived at after an agreed reconciliation of the accounts, after which the applicant made a payment proposal that was not acceptable to the respondent, and thereafter the respondent filed suit to recover the agreed sum.
7. In the circumstances, counsel submitted, the appeal is not arguable. Secondly, that even if the appeal were to succeed, the respondent is capable of refunding any amount paid by the applicant, considering that in the year ending 31st December 2023 the respondent made a net profit of Kshs.5.568 billion. She therefore urged us to dismiss the application.
8. We have considered the affidavits filed by the parties, their submissions, as well as the oral highlights thereof as summarised hereabove. In an application for stay of execution pending appeal or intended appeal, the applicant must satisfy the Court that there is an arguable appeal, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. An arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully. (See Dickson Sinkeet Mapi (Suing as the Personal Representative of Benjamin Mapi Ole Partimo – Deceased v Mutunkei (Civil Appeal (Application) E041 of 2020) [2021] KECA 235 (KLR) (3 December 2021) (Ruling)).
9. In our view, this appeal is not arguable. Regarding the ground that the trial court erred in failing to refer the matter to arbitration, we agree with the respondent's submission that although the distribution agreement initially provided that disputes arising from the agreement would be referred to arbitration, the same was rendered inoperable because there was a variation thereto on 18th June 2020 that allowed Kenyan courts to settle any disputes in connection or arising from the agreement.
10. With regard to the amount in question, there was a reconciliation exercise that was well undertaken by the parties and the sum of Kshs.56,184,300.15 was arrived at, after which the applicant made a proposal for payment which was not acceptable to the respondent. In the circumstances, the applicant cannot argue that the same is not due and payable.
11. Once this Court has come to the conclusion that an appeal or intended appeal is not arguable, it need not consider the second limb, that is, whether the appeal, if successful, will be rendered nugatory. But even if we had found that the appeal is arguable, there was no averment by the applicant that the appeal would be rendered nugatory. The applicant only argued that it would suffer substantial loss, which is different from an appeal being rendered nugatory. In any event, it was not disputed by the applicant that the respondent is well able to refund the decretal sum in the event that the appeal succeeds.



12. For these reasons, we find this application lacking in merit and hereby dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2025.

D. K. MUSINGA (PRESIDENT)

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

