



**Lodwar Wholesalers v Commissioner of Investigation & Enforcement , Kenya Revenue Authority
(Civil Appeal (Application) E498 of 2023) [2024] KECA 280 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 280 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E498 OF 2023
MSA MAKHANDIA, P NYAMWEYA & JM MATIVO, JJA
MARCH 8, 2024**

BETWEEN

LODWAR WHOLESALERS APPLICANT

AND

**COMMISSIONER OF INVESTIGATION & ENFORCEMENT , KENYA
REVENUE AUTHORITY RESPONDENT**

*(Being an application for stay of execution of the Judgment of the
High Court of Kenya at Nairobi (Njoki Mwangi J) dated 29th
September 2023) in HCCOMMITA Tax Appeal No. 1 of 2022)*

RULING

1. Before us is a Notice of Motion dated 25th October 2023, in which Lodwar Wholesalers, “the applicant”, seeks for the stay of execution of the Judgment and decree of the High Court dated 29th September 2023 upholding the decision of the Tax Appeals Tribunal dated 18th December 2019.
2. The grounds upon which the Motion is predicated are that the High Court delivered its judgment and decree on 29th of September 2023 which upheld the decision of the Tax Appeals Tribunal for the payment of the amount of KShs.203,520,805.00 by the applicant. In a nutshell, the High Court dismissed the applicant’s appeal. Being aggrieved by the said judgment and decree, the applicant has filed a Notice of Appeal dated 12th October 2023 manifesting its intention to appeal the decision in this Court. That the intended appeal is arguable on the grounds that: the learned Judge erred by delivering a judgment that was against the weight of the evidence, misdirected herself on matters of both law and fact; and failed to take into account issues resolved in the Alternative Disputes Resolution Mechanism between the parties.
3. On the nugatory aspect, the applicant states that if the orders are not granted, in the event it succeeds in the appeal, it will not be able to recover money paid in satisfaction of the judgment and decree



without considerable difficulty. That all acts executed in furtherance of the judgment and decree will be prejudicial and detrimental to the applicant, and that no prejudice would be occasioned to the respondent if the orders sought are granted.

4. The application was supported by the affidavit of one John Githua Njogu dated 25th October 2023 in which he reiterates the grounds above.
5. The application was opposed by the respondent through the replying affidavit of Sheila Odawa. She deposed that the applicant had not adduced any evidence of imminent execution of the decree by the respondent. Further, it had not placed before the Court its financial position and how it would be affected should the respondent proceed to enforce the Judgement and decree. That the applicant had failed to demonstrate that it has an arguable appeal which would be rendered nugatory if the application is not allowed. Further, no evidence had been presented to show that it would suffer prejudice if execution ensues. Indeed, it will be the respondent and by extension, the Kenyan citizenry who stand to be prejudiced on account of any further delay in the collection of the taxes, necessary to provide, essential services and funding which is a matter of public interest. Further, it is the respondent's case that it is apprehensive that there is a real and present danger that the applicant may close shop and make the recovery of the decretal sum impossible. The respondent deposes that being the principal revenue collecting agency, it is not only capable of reimbursing the applicant, the amount but can also apply any amount found to have been unduly levied to future taxes of the applicant. In the alternative, the respondent suggested that if the Court was inclined to grant the application, then it should direct that half of the decretal amount be paid to the respondent and the other half be deposited in an interest-earning account in the joint names of the advocates for the parties within 30 days from the date of this ruling and order.
6. The application was canvassed by way of written submissions with limited oral highlights. Mr. Atukunda, learned counsel for the applicant submitted that the applicant had an arguable appeal based on the grounds already stated elsewhere in this ruling. He relied on the case of *Joseph Gitabi Gachau & Another vs. Pioneer Holdings (A) Limited & 2 Others [2009]* eKLR, for the proposition that an arguable appeal is not one that must succeed but one which is not frivolous.
7. As to the nugatory aspect of the appeal, counsel submitted that due to the prevailing harsh economic conditions, the applicant shall suffer great prejudice, loss, and harm if compelled to pay the decretal sum. On the other hand, no prejudice will be occasioned to the respondent.
8. On its part, the respondent submitted that the applicant's intended appeal is not arguable at all. The grounds are anchored on law and fact that contravenes section 56(2) of the *Tax Procedures Act, 2015*. Thus, no arguable point of law has been raised in the intended appeal. Counsel relied on the case of *Commissioner of Customs vs. Amit Doshi [2007]* eKLR, for the proposition. On the nugatory aspect, the 1st respondent submitted that following the decision in *Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others (2014)* eKLR, there is no order capable of being stayed as the Court did not direct either party to do or refrain from doing anything. The Court merely dismissed the appeal for lack of merit.
9. We have considered the application, the grounds in support thereof, the replying affidavit, the submissions, the authorities cited, and the law. The jurisdiction under rule 5(2) (b) of this Court's Rules is discretionary and guided by the interests of justice. In the exercise of this discretion, the Court must be satisfied on the twin principles, which are that the appeal is arguable and that if the orders sought are not granted and the appeal succeeds, the appeal will be rendered nugatory.



10. This Court in the case of Trust Bank Limited and Another vs. Investech Bank Limited and 3 Others [2000] eKLR, delineated its jurisdiction in such an application as follows:

“The jurisdiction of the Court under Rule 5(2)(b) is original and discretionary and it is trite law that to succeed an applicant has to show firstly that his appeal or intended appeal is arguable, to put another way, it is not frivolous and secondly that unless he is granted a stay the appeal or intended appeal, if successful will be rendered nugatory. These are the guiding principles but these principles must be considered against facts and circumstances of each case...”

11. In considering the twin principles set out above, we are cognizant of the fact that to benefit from the discretion of this Court, both limbs must be demonstrated to the Court’s satisfaction.

12. The respondent argued that from the learned Judge’s decision, there was no order capable of being stayed as she merely dismissed the applicant’s appeal. It is now settled law that the issue as to whether a negative order is capable of being stayed is paramount in determining the success or otherwise of an application under rule 5(2)(b) of this Court’s rules such as the one before us. See *George Ole Sangui vs. Kedong Ranch Limited*, Civil Application No. Nai 55 of 2015 where this Court citing the famous case of *Western College of Arts And Applied Sciences vs. Oranga & Others* [1976] KLR 63, pronounced itself as follows:

“In the instant case, the High Court dismissed the suit in which the applicants were seeking a declaration and an order to be registered as the proprietors of the suit land on the basis of the doctrine of adverse possession. The dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stay of the order of the dismissal of the suit it cannot be granted.” (Emphasis ours)

13. In the motion before us, we are satisfied that the applicant seeks a stay of execution of a negative order which on the authorities is incapable of being stayed. This finding settles the application in its entirety. Accordingly, we find this application devoid of merit and is hereby dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2024.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL



I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

