



**Kenya Revenue Authority v County Assemblies Forum & 2 others;
Salaries Remuneration Commission (Interested Party) (Civil Application
E093 of 2023) [2024] KECA 923 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KECA 923 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E093 OF 2023
FA OCHIENG, JM MATIVO & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

COUNTY ASSEMBLIES FORUM 1ST RESPONDENT

CONTROLLER OF BUDGET 2ND RESPONDENT

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

AND

SALARIES REMUNERATION COMMISSION INTERESTED PARTY

(An application for stay of execution pending lodging, hearing, and determination of an intended appeal from the judgment of the High Court in Kericho (J. Serгон, J.) delivered on 12th October, 2023 SALARIES REMUNERATION COMMISSION..... INTERESTED PARTY in HC. Petition No. 4 of 2023)

RULING

1. On 12th October 2023, the Hon. Justice Serгон delivered a judgment in Constitutional Petition No. 4 of 2023, at the High Court, Kericho.
2. In the said judgment, the learned Judge issued the following two substantive orders;
 - “(i) An order of declaration is hereby issued that Members of the County Assembly Motor Vehicle reimbursement amount does not fall within the ambit of Sections 3 and 5 of the Income Tax Act, therefore the same is not subject to tax.



(ii) The 1st respondent is restrained from imposing tax on the members of the County Assembly Motor Vehicle reimbursement benefit.”

3. Being aggrieved with the said judgment, the 1st respondent (the Kenya Revenue Authority) lodged an appeal before this Court. The notice of appeal was lodged on 16th October 2023, whilst the record of appeal was lodged on 27th October 2023.
4. Pending the hearing and determination of the said appeal, the applicant has asked this Court to issue an order for a stay of execution of the judgment.
5. According to the applicant, it had already been threatened with applications for a refund of the amounts which the County Assemblies had remitted to the applicant, on account of taxes charged on the motor vehicle reimbursement allowances.
6. By her supporting affidavit, Nelly Musyoka, who is an Officer serving within the applicant’s Public Sector Division, said that it is the said division where the tax issues relating to the County Assemblies and Parliamentary Service Commission are domiciled. She was therefore conversant with the issues which gave rise to the suit herein.
7. Ms. Musyoka pointed out that the vehicles purchased with the motor vehicle reimbursement allowances were registered in the names of the individual members of the County Assembly. Therefore, the said vehicles were the personal properties of each such individual.
8. Following the delivery of the impugned judgment, the Parliamentary Service Commission and the 47 County Assemblies stopped deducting taxes at the point of disbursement of the motor vehicle reimbursement allowance.
9. Secondly, the County Assemblies which had remitted the taxes, have now applied for the refund of the taxes which they had earlier remitted.
10. The applicant holds the view that its pending appeal is not only arguable but also has a high probability of success.
11. The applicant contends that if the court does not order a stay of execution, the appeal would be rendered nugatory.
12. In answer to the application, the 1st respondent filed a replying affidavit that was sworn by its chairperson, Hon. Philemon Sabulei. He reiterated that the learned trial Judge had restrained the applicant from imposing tax on the Members of the County Assembly Motor Vehicle reimbursement benefit.
13. In his understanding, if execution was stayed, that would be tantamount to authorizing the applicant to continue collecting a tax that had been held to be unlawful.
14. In any event, if the appeal were to succeed, the respondents believe that the said appeal would not be rendered nugatory, as the applicant is legally empowered by law, to demand tax without any limitation as to time.
15. In the light of the mandate bestowed upon the applicant, pursuant to Sections 39 and 40 of the [Tax Procedures Act](#), the respondents reasoned that the applicant would have no difficulty in issuing appropriate demand notices to the Members of the County Assemblies if this Court were to ultimately allow the appeal.



16. At paragraph 14 of the replying affidavit, the 1st respondent made a concession, that the applicant's appeal was arguable.
17. However, the respondents were convinced that the applicant does not stand to suffer any prejudice, should the court not stay the execution of the judgment pending the determination of the appeal.
18. It is common ground, between all the parties that pursuant to the well-settled principles which govern the Court when it is called upon to discharge its unfettered discretion under Rule 5(2)(b) of the Court of Appeal Rules. The Rule states that:

“2 Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may —

- (a) ...
- (b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”

19. In the case of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR, this 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 Gitabi 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.
 - ii. 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.
 - iii. 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.”
20. In our assessment, we find that the appeal lodged by the applicant is arguable. Therefore, the respondents were prudent to have conceded that aspect.
21. On the question concerning whether or not the appeal would be rendered nugatory if the execution of the judgment was not stayed, the respondents asked this Court to adopt the following words, from the decision in *Kenya Revenue Authority vs De La Rue Currency and Security Print Limited & 2 Others* [2009] eKLR;
- “On the second point of whether the appeal will be rendered nugatory unless a stay is granted, we are satisfied that the same will not be rendered nugatory, because all the applicant is required to do is to follow the law. We do not see how doing just that will render the appeal nugatory.”
22. Nyamu J. (as he then was) had held that the applicant had, in awarding the tender to the 3rd respondent, breached the mandatory provisions of the Public Procurement and Disposal Act. It was in that context that the Court of Appeal rejected the application for a stay of execution because the applicant was simply being told that it had an obligation to comply with the mandatory provisions of the relevant statute.
23. We are in full agreement with the said decision, as each and every one of us is required to comply with the law.
24. In the matter before us, there is a dispute about the meaning and tenor of the statutory provision. On the one hand, the applicant believes that the Member of the County Assembly motor vehicle reimbursement amount falls within the ambit of Sections 3 and 6 of the *Income Tax Act*, and is therefore subject to tax; whilst the respondents persuaded the learned Judge at the High Court to declare that the said amounts were not subject to tax.
25. The applicant has already set in motion the appeal process to challenge the declaration.
26. Significantly, the respondents have expressly conceded that the appeal is arguable. In effect, the respondents appreciate that the decision of the High Court could possibly be upset when the appeal is determined.
27. It therefore follows that until the appeal is determined, it would not be clear whether or not the declaration made by the trial court had correctly interpreted the applicable statutory provisions. To that extent, this case is distinguishable from the authority cited by the respondents.



- 28. We take Judicial Notice of the fact that Members of the County Assemblies hold their respective positions by virtue of either election or nomination. Therefore, their said positions may change with the 5-year cycle of elections in Kenya.
- 29. In the circumstances, even though the applicant has the mandate to demand the payment of taxes, we find that if the appeal was to succeed, whilst the applicant had been compelled to repay to the members of the County Assembly, the taxes payable under the scheme in issue herein, the appeal may well be rendered nugatory.
- 30. The applicant has satisfied the twin principles for the grant of the orders for stay of the execution, and we do therefore order that there shall forthwith issue herein an order of stay of execution of the judgment delivered on 12th October 2023, in Kericho Constitutional Petition No. 4 of 2023, together with the orders flowing therefrom; this order shall remain in force until the hearing and determination of the applicant’s appeal.
- 31. Costs of the application shall abide by the appeal; so that the party who ultimately succeeds in the said appeal, shall stand awarded the costs of this application, too.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024.

F. OCHIENG

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR