



**Kenya Revenue Authority v Kiragu & 5 others (Civil Application E047 of 2023) [2023] KECA 1002 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 1002 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E047 OF 2023  
DK MUSINGA, A ALI-ARONI & JM MATIVO, JJA  
JULY 28, 2023**

**BETWEEN**

**KENYA REVENUE AUTHORITY ..... APPLICANT**

**AND**

**JUDITH KARIGU KIRAGU ..... 1<sup>ST</sup> RESPONDENT**

**DANIEL MASI MOGENI ..... 2<sup>ND</sup> RESPONDENT**

**NICKSON MWANGI MAINA ..... 3<sup>RD</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**THE NATIONAL ASSEMBLY ..... 5<sup>TH</sup> RESPONDENT**

**THE BETTING CONTROL AND LICENSING BOARD ..... 6<sup>TH</sup> RESPONDENT**

*(Being an application for stay of execution of the Judgment of the High Court at Nairobi (Mrima, J.) delivered on 31st January 2023 in H.C. Petition No. E406 of 2021)*

**RULING**

**RULING OF THE COURT**

1. Before this Court is a Notice of Motion dated February 17, 2023 which is brought by the applicant pursuant to the provisions of sections 3A and 3B of the *Appellate Jurisdiction Act*, and rules 5(2) (b) and 42 of the Rules of this Court. The applicant seeks stay of execution of the judgment of the High Court at Nairobi (Mrima, J) delivered on 31<sup>st</sup> January 2023 in High Court Petition No E406 of 2023 pending the hearing and determination of an intended appeal.
2. The background of this application is that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, who are officials of The Association of Gaming Operators of Kenya, commenced proceedings on behalf of their members against the applicant and the 4<sup>th</sup> and 5<sup>th</sup> respondents, challenging amendments introduced to the



Excise Duty Act by section 32 of the Finance Act. They contended that the process leading up to the introduction of excise duty on betting, gaming, price competitions and lotteries and the provision raising the tax to 30% and apportioning 7.5% on betting, gaming, price competitions and lotteries fell short of various constitutional edicts and other statutory provisions. It was posited, inter alia, that key industry players had not been involved in the enactment of the amendments and that public participation as contemplated under the Constitution had not taken place. They sought, inter alia, a declaration that paragraphs 4B and 4D of Part II of the First Schedule to the Excise Duty Act, 2015 introduced by section 32 of the Finance Act, 2021 are unconstitutional and therefore null and void and of no legal effect.

3. The trial court vide judgment delivered on January 31, 2023 made the following findings on the issue of public participation:

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“129. From the record of the public engagement meetings, there were robust representations by various stakeholders on the proposed levy on betting. None of them addressed the aspect of taxation on gaming and lottery. Going by the gravity of the submissions made by the participants during the public meetings on betting, there is no doubt that the public ought to have been accorded an opportunity to also express themselves on the issues of gaming and lottery. That opportunity was, however, not accorded.

130. The upshot is, therefore, that there was no iota of public engagement or at all towards the subsequent enactment of the impugned amendment.”

4. The orders issued by the trial court were a declaration that paragraphs 4B and 4D of Part II of the First Schedule to the Excise Duty Act, 2015 introduced by section 32 of the Finance Act, 2021 are in violation of Articles 10(2), 201(a) and 47 of the Constitution for want of public participation, stakeholder engagement and fair administrative procedures; a declaration that paragraphs 4B and 4D of Part II of the First Schedule to the Excise Duty Act, 2015 introduced by section 32 of the Finance Act, 2021 are unconstitutional, null and void and of no legal effect.
5. The applicant was dissatisfied with the decision of the trial court and intends to lodge an appeal before this Court and has already filed a notice of appeal dated February 13, 2023 evincing its intention to appeal.
6. It is contended on the face of the motion, the affidavit in support and supplementary affidavit sworn by Josephine Mugure, the Chief Manager, Strategy, Innovation and Risk Management Department of the applicant, that the applicant has an arguable appeal with high chances of success. She states that the learned judge issued the said orders notwithstanding a confirmation that indeed there was public participation, a fact confirmed by the 1<sup>st</sup> to 3<sup>rd</sup> respondents at paragraphs 10 to 14 of the impugned judgment.
7. The grounds on arguability as set out in the draft Memorandum of Appeal annexed to the affidavit in support of the application are, inter alia, that the learned judge erred in law and in fact by deciding the matter and failing to appreciate the substratum of this matter which is the exercise of a statutory mandate pursuant to sections 5(1) (b), (3)(b), 10, 16(1) (c) of the Excise Duty Act, 2015 and sections 37, 38 and 39 of the Public Finance Management Act, 2012; in making wrong interpretations of Articles 27, 43, 46 (1), 47, 201(1) (b) (i), 210 and 221 of the Constitution; and by interpreting the decisions in Isaac Gachomo & 3 Others v Attorney General & Another; Central Bank of Kenya & Another (Interested



*parties*) [2019] eKLR and *Pevans East Africa Limited & another v Chairman, Betting Control and Licensing Board and 7 Others* [2018] eKLR; Civil Appeal No 11 of 2018 on public participation in an isolated manner.

8. On nugatory aspect, it is contended that the implementation of the impugned judgment will greatly affect the execution of the applicant's mandate, and in particular the colossal amount of revenue involved; that the impugned judgment has a huge revenue implication which will affect the delivery of services to  
the citizenry of the Republic; the applicant stands to suffer insurmountable loss of revenue if the orders sought are not granted; and that unless the application is allowed, the intended appeal will be rendered nugatory as the *Excise Duty Act*, 2015 provides timelines to submit returns on gaming and lottery.
9. The application is opposed by the 1<sup>st</sup> to 3<sup>rd</sup> respondents through a replying affidavit sworn by the 1<sup>st</sup> respondent. They argued that the applicant is seeking to introduce new issues that were not raised before the trial court in an attempt to demonstrate that its intended appeal is arguable.
10. They further contended that the impugned judgment does not contain any positive orders capable of being executed and therefore, the jurisdiction of this Court to grant orders of stay in the circumstances was denied. They further stated that the grounds cited by the applicant in the draft Memorandum of Appeal do not disclose that it has an arguable appeal, or that the intended appeal will be rendered nugatory if the orders sought are not granted. We were urged to dismiss the application with costs.
11. At the hearing of this application Mr. Ochieng appeared for the applicant; Mr. Amoko was present for the 1<sup>st</sup> to 3<sup>rd</sup> respondents; Mr. Kuiyoni represented the 5<sup>th</sup> respondent; but there was no appearance for the 4<sup>th</sup> and 6<sup>th</sup> respondents, despite service of a hearing notice.
12. \_\_\_\_\_ Highlighting the applicant's written submissions dated March 2, 2023, counsel submitted that the Committee Stage of the National Assembly is a public participation forum for purposes of enactment or amendment of the law. Reliance for this argument was placed on the decisions of the High Court in *Mjengo Limited & 3 Others v Parliament of Kenya & Another* (Petition E290 of 2021) [2022] KEHC 13517 (KLR) and *Basco Products (K) Limited & 4 others v National Assembly & 3 others; Kenya Association of Manufacturers (Interested Party)* (Petition E286 of 2021) [2022] KEHC 168 (KLR) (Constitutional and Human Rights) (24 February 2022). Counsel contended that the trial court erred in holding that there was no public participation in light of the holding in these two decisions.
13. The applicant reiterates in its written submissions that its intended appeal is arguable as per the grounds cited in the draft Memorandum of Appeal and notes that an arguable appeal is not one which must succeed, but one which ought to be argued fully before the Court. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No Nai 345 of 2004.
14. On the nugatory aspect, it is contended that the impugned judgment has thrown the country's revenue collection in quagmire, such that the applicant cannot successfully implement tax compliance under several tax heads, in particular, affecting its tax collection mandate on the projected  
revenue targets for the financial year 2022/2023; that no offer to provide security has been made or an undertaking that the 1<sup>st</sup> to 3<sup>rd</sup> respondents will be able to pay the tax arrears if the appeal is successful. The uncollected taxes may therefore not be recoverable in the event the intended appeal is successful. Lastly, it is contended that the matter is of great public interest; and that the balance of convenience tilts in favour of granting the orders sought.



15. The 5<sup>th</sup> respondent associated itself with the submissions made by the applicant and stated that the applicant had satisfied the twin test for grant of the orders sought as laid down in *Stanley Kinyanjui Kangethe v Tony Ketter & Others* [2013] eKLR.
16. Mr. Amoko submitted that the impugned judgment does not contain any positive obligations capable of execution and therefore, this Court lacks the jurisdiction to grant the orders sought in the application.
17. On the twin test to be satisfied in applications of this nature, counsel reiterated that it had not been demonstrated that the intended appeal is arguable, or that it would be rendered nugatory if the orders sought are declined. Lastly, it was submitted that there is no public interest involved in collecting unconstitutional taxes.
18. We have considered the application, the written submissions by the parties and the applicable law. It is trite law that in an application of this nature an applicant must demonstrate that the appeal or intended appeal, is arguable which is to say that the same is not frivolous. The applicant must also show that the appeal would be rendered nugatory if the orders sought are not granted. See *Stanley Kinyanjui Kangethe v Tony Ketter & Others* (supra). In determining whether the intended appeal is arguable or not, we are cognizant of the fact that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous. See *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd & 2 others*, Civil Application No 124 of 2008. A single bona fide arguable ground of appeal is sufficient to satisfy this requirement. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, (supra).
19. We have perused the draft memorandum of appeal and the impugned judgment. The grounds raised by the applicant are, in our view, not idle. We are satisfied that the intended appeal is arguable.
20. Turning to the nugatory aspect, the applicant states that the impugned judgment has impacted adversely on its revenue collection. It is also contended that the 1<sup>st</sup> to 3<sup>rd</sup> respondents have not offered to provide security or demonstrated that they will be able to pay the uncollected tax if the intended appeal is successful. The uncollected tax may therefore be unrecoverable should the intended appeal be successful. It is further contended that failure to grant the orders sought will have irreversible effects on the collection of revenue, which will affect the public at large and hence the argument that there is great public interest to be protected by granting the orders sought.
21. This Court in *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR stated thus:

“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 that allegation by evidence. See *International Laboratory for Research on Animal Diseases v Kinyua*, [1990] KLR 403.”
22. The 1<sup>st</sup> to 3<sup>rd</sup> respondents did not provide any proof of their ability to pay the uncollected taxes in the event that the intended appeal is successful. That obligation lay squarely on them, but they did not discharge it. We are of the view that if we do not grant the orders of stay as prayed by the applicant, the intended appeal shall be rendered nugatory, and the applicant may never be able to recover the uncollected tax if the intended appeal is successful. It is the citizens who stand to lose revenue if the 1<sup>st</sup> to 3<sup>rd</sup> respondents are not able to remit the uncollected tax to the applicant. On the other hand, if



we grant the orders sought and the applicant starts to collect the additional taxes, if the appeal fails the applicant has financial ability to refund the extra taxes it may have

collected. We also think that public interest gravitates towards grant of the orders sought. The applicant has, in our view, satisfied the second limb required for grant of orders of stay under rule 5(2) (b) of this *Court's Rules*.

23. We are therefore satisfied that the applicant has satisfied both limbs for grant of relief under rule 5(2)(b) of the Court's Rules. Accordingly, the Notice of Motion dated February 17, 2023 is hereby allowed. We direct that the costs of this application be in the intended appeal.

**Dated and delivered at Nairobi this 28<sup>th</sup> day July, 2023.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL**

**ALI - ARONI**

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**JUDGE OF APPEAL**

**J. MATIVO**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

