



REPUBLIC OF KENYA



**African Banking Corporation Limited v Commissioner of Domestic Taxes (Civil Appeal (Application) E453 of 2023) [2023] KECA 1669 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1669 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E453 OF 2023  
SG KAIRU, F TUIYOTT & JW LESSIT, JJA  
DECEMBER 15, 2023**

**BETWEEN**

**AFRICAN BANKING CORPORATION LIMITED ..... APPLICANT**

**AND**

**COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

*(An application for stay of execution pending the hearing and determination of an appeal against the judgment and order of the High Court of Kenya at Nairobi (Majanja, J.) delivered on 31st May 2023 in High Court Income Tax Appeal No. E014 of 2021)*

**RULING**

1. African Banking Corporation Limited, the applicant, is aggrieved by the judgment of the High Court at Nairobi (Majanja, J.) delivered on 31<sup>st</sup> May 2023 arising from an appeal from a judgment of the Tax Appeals Tribunal of 18<sup>th</sup> December 2020 concerning the interpretation and application of Excise Duty on various bank transactions. An audit of the applicant's financial affairs by the respondent for the years 2016 to September 2018 had resulted in Excise Duty assessment of Kshs.46,482,463.00 to which the applicant objected.
2. Aggrieved by the judgment of the High Court, the applicant is now before us with a motion dated 21<sup>st</sup> June 2023 having filed a notice of appeal seeking an order of stay of execution of the orders and decree of the High Court given on 31<sup>st</sup> May 2023 pending the hearing and determination of its appeal. The applicant also seeks an order for setting aside the demand of Kshs.86,076,985 issued by the respondent dated 13<sup>th</sup> June 2023.
3. To succeed in its application, the applicant is obliged to demonstrate that the intended appeal is arguable and that unless the interim orders sought are granted and the appeal succeeds, the same will be rendered nugatory. See Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others [2013] eKLR.



4. We have considered the application, the supporting affidavit of Louis Omukhulu, the applicant's written submissions dated 24<sup>th</sup> July 2023 which were orally highlighted before us on 25<sup>th</sup> October 2023 by learned counsel Miss. Wambui Njue holding brief for Ms. Diana Chepkemoi. We have also considered the replying affidavit sworn by Philip Mugoya, an officer of the respondent, the respondent's written submissions dated 7<sup>th</sup> August 2023 which we orally highlighted before us by Mr. E. Nyapara learned counsel for the respondent.
5. The applicant's grievances with the impugned judgment include complaints that the learned Judge of the High Court erred in determining that exported services are excisable despite absence of express provision in that regard under the Customs and Excise Act; and that the Judge wrongly applied provisions of the Finance Act 2013 retroactively. The respondent on the other hand has contended that the appeal is not arguable as the issues were satisfactorily resolved in the judgment of the High Court. Bearing in mind that an arguable appeal is not one that must necessarily succeed (See Kenya Industrial Estate Limited & anor vs. Matilda Tenge Mwachia [2021] eKLR), we are persuaded that the intended appeal is not frivolous. It is arguable.
6. As to whether the appeal will be rendered nugatory unless the orders sought are granted, it was submitted by counsel for the applicant that the amount of Kshs.86,076,985 demanded by the respondent is colossal and enforcement of the entire amount pending the determination of the appeal will significantly impact the cash flows of the applicant. The applicant has offered to provide security by way of bank guarantee.
7. Counsel for the respondent on the other hand submitted that what is sought to be stayed is reversible and the appeal will not be rendered nugatory; that the respondent is capable of refunding the amount in question should the appeal ultimately succeed. Counsel urged that should the Court be inclined to grant the orders sought, it should be conditional upon the applicant paying over "sufficient security being 60% of the total taxes demanded" The decision in Caltex Oil (Kenya) Ltd vs. Evanson Njiri Wapuihia [2009] eKLR was cited.
8. }Having considered the rival positions, we are inclined to agree that payment of the entire amount pending the determination of the appeal may affect the applicant's operations. See Equity Bank of Kenya Limited vs. Commissioner of Domestic Taxes [2022] KECA 128 (KLR).

Balancing the interests of the parties, what commends itself to us is to order, which we hereby do, a stay of execution of the demand by the respondent conditional upon the applicant paying over to the respondent, within 30 days from the date of delivery of this ruling, an amount of Kshs.25,000,000.00. In default, the order of stay granted herein shall automatically lapse and the respondent shall be at liberty to proceed with execution.

9. The costs of the application shall be costs in the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER 2023**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**



**J. LESIIT**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**

