



Equity Bank of Kenya Limited v Commissioner of Domestic Taxes (Civil Application E150 of 2021) [2022] KECA 128 (KLR) (18 February 2022) (Ruling)

Neutral citation: [2022] KECA 128 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E150 OF 2021
F SICHALE, J MOHAMMED & A MBOGHOLI-MSAGHA, JJA
FEBRUARY 18, 2022**

BETWEEN

EQUITY BANK OF KENYA LIMITED APPLICANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an Application for Injunction/ Stay of Execution of the judgment of the High Court of Kenya (Majanja J.), dated 31st March 2021 in Nairobi High Court Commercial & Tax Division Tax Appeal No. E004 of 2019 consolidated with E002 of 2020)

RULING

1. The applicant, Equity Bank Limited has moved this Court vide a motion dated 11th May 2021, expressed to be brought pursuant to the provisions of Rule 5 (2) (b) of the *Court of Appeal Rules*, seeking inter alia: “a temporary injunction to restrain the respondent from issuing enforcing either by way of issuance of agency notices, attachment of the appellant’s account or undertaking any other action against the appellant to recover the sum of Kshs 234,138,308.00, pending the hearing and determination of the intended appeal herein.”
2. The applicant further seeks an order of “stay of execution of the judgment dated 31st March 2021 and resultantly Tax Appeal Tribunal decision issued on 18th December 2019 and the demand dated 7th April 2021 pending the hearing determination of the appellant’s intended appeal.”
3. The motion is supported by the grounds on the face of it and an affidavit sworn by Lydia Ndirangu, the applicant’s Legal Manager, who deposed inter alia that by a letter dated 19th September 2017, the respondent had written to the applicant indicating amongst other items, a Pay As You Earn (“PAYE”) assessment for the year 2016 totaling Kshs 1,738,969,276.00, pursuant to which the applicant lodged an appeal at the Tax Appeals Tribunal objecting to the said assessment. In a decision rendered on 18th December 2019, the Tribunal allowed part of the applicant’s appeal and dismissed the other.



4. She further deposed that in disallowing part of the applicant's appeal and in particular, on the question as whether the appellant was liable to a "PAYE" benefit to employees, the Tax Appeals Tribunal upheld the Respondent's assessment on the basis that the applicant did not account for PAYE on the vesting of shares in an employee share ownership plan, which assessment in this regard was to the tune of Kshs 234,138,308.00.
5. That, being aggrieved by the aforesaid decision of the Tax Appeals Tribunal, both the applicant and the respondent filed an appeal at the High Court resulting in both appeals being consolidated and that vide a judgment delivered on 31st March 2021, Majanja, J. dismissed both appeals. The learned judge upheld the decision of the Tax Appeals Tribunal in respect of payment of Kshs 234,138,308.00 as PAYE to the respondent.
6. That the applicant being aggrieved with the aforesaid decision of the High Court had appealed against the same to this Court and that in the meantime, vide a letter dated 7th April 2021, the respondent had issued a demand for immediate payment of the aforesaid sums and threatened to institute immediate enforcement action if the amount was not paid forthwith. Further, that the applicant had an arguable appeal for reasons inter alia that the High Court erred in law in the manner it interpreted and applied the provisions of Sections 3(2) (a) (ii), 5(2) (b) and 5 (5) (a) of the Income Tax Act in resolving the dispute before it.
7. She further deposed that if the orders sought were not granted, the applicant's appeal would be rendered nugatory and the applicant's business will be severely affected as a result of payment of the aforesaid sum which was fairly significant in ordinary business operations. Finally, that the applicant was willing and ready to furnish a bank guarantee for the entire amount aforesaid as security for performance of the decree should its appeal ultimately fail.
8. The motion was opposed vide a replying affidavit sworn on 26th May 2021, by Wilberforce Munge a Supervisor within the respondent's domestic department who deposed inter alia that the applicant had not demonstrated by way of evidence, the substantial loss it would suffer if stay of execution was not granted; that it was not sufficient for the applicant to merely state that the decretal amount of taxes due was substantial and that enforcement of the tax would expose it to economic hardship, irreparable and substantial loss and further that it had not been demonstrated that the applicant had an arguable appeal.
9. On 23rd November, 2021, the motion came before us for hearing "via GoToMeeting video link" on account of the Covid 19 protocols. Learned counsel Mr. Nyaburi for the applicant submitted that the applicant had an arguable appeal for the reason that the applicant did not set up the employee share ownership plan but only played a facilitative role to enable its employees acquire shares being sold by its shareholder, AMF using funds obtained by the employees from British American Insurance Company; that the ownership plan was not set up by the applicant and as such, it was not a benefit or advantage granted by the applicant and neither did it stand to make any direct gains or profits from the same; that the applicant had an arguable appeal on the issues as to whether the High Court misinterpreted the law as to whether the applicant played any role in setting up the employee share ownership plan, incurred any cost or provided any benefit in the establishment of the same.
10. On the nugatory aspect, counsel submitted that the respondent had already threatened to commence enforcement measures and that in the event of the respondent proceeding with enforcement and recovery of Kshs 234,138,803.00, the intended appeal would be rendered a mere academic exercise. Further, that the applicant would suffer unbearable hardship as the amount in question was by any standard huge and would cripple its operations.



11. In opposition to the motion, learned counsel Mr. Said for the respondent submitted that it had not been indicated or explained what loss if any, the applicant would suffer should the stay orders not be granted and that it was not sufficient for the applicant to merely state that it would suffer irreparable harm.
12. On the nugatory aspect, it was submitted that even if the respondent proceeds with the enforcement, the substratum of the appeal would not be rendered mute due to the fact that if the appeal was determined in favour of the appellant, the appellant would still be able to apply those taxes for future tax liabilities. It was further contended that there was no possibility of the intended appeal being rendered nugatory since the respondent is a statutory body whose function is necessary for the functioning of the Kenya Government with substantial funding to facilitate any refund or application of the taxes already paid.
13. We have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the rival written submissions and the oral highlights made by the parties before us on 23rd November 2021, the authorities cited and the law.
14. The applicant's motion is brought under Rule (5) (2) (b) of this Court's Rules. Rule 5 (2) (b) of the Rules, which guides the Court in applications of these nature provides:
 - “(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 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.”
15. The principles for our consideration in the exercise of our unfettered discretion under Rule 5 (2) (b) to grant an order of stay or injunctions are now well settled. Firstly, an applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles were summarized by this Court (differently constituted), in the case of *Stanley Kangethe Kinyanjui vs. Tony Ketter & Others [2013] eKLR* as follows:
 - 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.
 - v. The discretion of this Court under Rule 5(2) (b) to grant a stay of injunction is wide and unfettered provided it is just to do so.
 - vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.
 - vii. In considering whether the appeal will be rendered nugatory the Court must bear in mind that each case must depend on its own facts and peculiar circumstances.
 - viii. An applicant must satisfy the Court on both the twin principles.



- ix. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.
 - x. 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.
 - xi. 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.
 - xii. The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.
 - xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
16. With regard to the first limb, it was submitted for the applicant inter alia that it had an arguable appeal for the reasons that the High Court erred in the manner it interpreted and applied the provisions of Sections 3 (2) (a) (ii), 5 (2) (b) and 5 (5) (a) of the *Income Tax Act* to resolve the dispute before it and that further it erred in fact and in law in finding that the manner in which the employee share ownership plan was formed was not relevant for purposes of determining whether the appellant was liable to deduct and remit staff benefits under Section 37 of the *Income Tax Act* and PAYE to the respondent.
17. We have indeed looked at the Memorandum of Appeal dated 11th May 2021 and from a cursory perusal of the same and from the circumstances of this case, we are satisfied that the applicant has demonstrated that it has an arguable appeal worthy of consideration by this Court. As we had alluded to earlier, an arguable appeal is not one that must necessarily succeed. We are of course mindful of the fact that we will not say more regarding this issue lest we embarrass the bench that will eventually be seized of the appeal.
18. On the nugatory aspect, it is indeed not in dispute that the respondent has already issued a demand and threatened to commence enforcement measures against the applicant. No doubt, the amount involved is colossal as the same is to the tune of Kshs 234,138,308.00/= and if the respondent is allowed to proceed with enforcement of the same, it is likely that the applicant will suffer unbearable hardship that may have the effect of stifling and crippling its operations. In any event, the applicant has submitted that it is prepared to furnish a bank guarantee s security for payment of the entire sum should the appeal fail. We are satisfied that the appeal will be rendered nugatory if an order of stay/injunction is not granted.
19. In view of the above, and the applicant having established the twin principles for consideration in an application under Rule 5 (2) (b) of this Court’s Rules, we accordingly allow the motion dated 11th May 2021 in terms of prayers 3 and 5 therein.
20. The costs of the motion shall abide the outcome of the appeal

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

F. SICHALE

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JUDGE OF APPEAL



J. MOHAMMED

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

