



REPUBLIC OF KENYA



KENYA LAW
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**Kenya Revenue Authority v Mount Kenya Breweries Limited (Civil Application
E383 of 2021) [2022] KECA 1002 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 1002 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E383 OF 2021
DK MUSINGA, S OLE KANTAI & HA OMONDI, JJA
SEPTEMBER 23, 2022**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

MOUNT KENYA BREWERIES LIMITED RESPONDENT

*(Application for stay of execution of the ruling and orders of the High Court
at Nairobi (Korir, J.) dated 29th October 2021 in Petition No. E172 of 2021.)*

RULING

1. The applicant's Notice of Motion dated May 11, 2021 seeks stay of execution of the ruling and orders of Korir, J. (as he then was), dated October 29, 2021 which were issued in Petition. No. E172 of 2021.
2. A precis of the facts leading to the instant application is that on April 9, 2021 the applicant, acting on intelligence information, made an impromptu visit at the premises of the respondent and found the latter engaging in unlawful activities of production of alcoholic drinks contrary to the provisions of the *Excise Duty Act*. The applicant invoked certain provisions of the *Excise Duty Act* and Legal Notice No. 53 of 2017 and seized motor vehicle registration number KCC 432H and 16,600 bottles of 250ml sparkler vodka which had been affixed with counterfeit excise duty stamp. The applicant also served the respondent with a Suspension Notice on 26th April 2021 pursuant to the provisions of section 23(4) of the *Excise Duty Act*, effectively bringing production at the respondent's factory to a halt. According to the applicant, the respondent was engaging in an unlawful activity which resulted into massive loss of revenue to the Government. In this regard, the applicant sent a tax demand to the respondent in the sum of Kshs. 934,816,934.00.
3. In a Notice of Motion application dated May 11, 2021 which was filed contemporaneously with High Court Petition No. E172 of 2021, the respondent sought, inter alia, conservatory orders to restrain the applicant from continuing to lock, seal the outer doors or in any way denying or limiting access



- of its manufacturing premises. The respondent also sought orders directing the applicant to reinstate its excise license.
4. In a ruling dated October 29, 2021, the High Court issued several orders including a conservatory order restraining the applicant from continuing to lock, seal the outer doors or limiting the access of the respondent to its premises; an order directing the applicant to reinstate the respondent's excise license and to facilitate the resumption of normal business operation; an order directing the applicant to release motor vehicle registration KCC 433H seized from the respondent's manufacturing premises. These are the orders which have given rise to the instant application.
 5. The application is supported by the grounds appearing on the face thereof and in the supporting affidavit sworn by Joan Mwangi, an officer of the applicant. The grounds in support of its arguability, which are captured in the draft Memorandum of Appeal are, inter alia, that the learned judge erred in law and in fact by contradicting express provisions of section 23(4) of the Excise Duty Act and Paragraphs 30, 32 and 33 of Legal Notice Number 53 of 2017; in failing to appreciate that in complying with its orders, the applicant will be contravening the express provisions of section 23 (4) of the Excise Duty Act; in failing to find that by virtue of the express admission and/or lack of denial of liability by the Respondent that it was in possession of counterfeit excise stamps and goods bearing counterfeit excise stamps they had not established a prima facie case thus was not entitled to the conservatory orders, and in failing to appreciate that being in possession of counterfeit excise duty stamps and goods bearing counterfeit stamps is a criminal offence contrary to section 90 of the Tax Procedures Act as read together with Paragraphs 30 of Legal Notice Number 53 of 2017.
 6. On nugatory aspect, it is argued that unless the application is allowed, the intended appeal will be rendered nugatory and the respondent is likely to continue benefiting from using excise stamps, hence leading to loss of revenue and unhealthy competition within the sector.
 7. The application is opposed by way of replying affidavit sworn by Solomon Wahome, a director of the respondent. The respondent deposes that the applicant has not demonstrated that it has both an arguable appeal, or that its intended appeal will be rendered nugatory in the event the respondent resumes normal business operations. The respondent states that the applicant can proceed with its intended appeal while the respondent continues to generate income and pay more taxes to it. It is further argued by the respondent that it will suffer irreparable harm should the application be allowed because it will continue to lose its business income.
 8. The applicant and the respondent have both filed their written submissions which are dated November 8, 2021 and November 22, 2021 respectively. The written submissions are a reiteration of the grounds set out in the motion and in the replying affidavit. At the hearing of this application, learned counsel Mr. Kabugu was present for the respondent. Although served with the hearing notice, there was no appearance on behalf of the applicant. Mr. Kabugu sought to rely entirely on his written submissions without highlighting the same.
 9. We have considered the application, the respective submissions as well as the applicable law. It is now well established that in an application of this nature, an applicant must satisfy this Court that the appeal or the intended appeal is arguable, and that unless the orders sought are granted, the appeal, if successful, shall be rendered nugatory. See Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR. Even one arguable ground of appeal will suffice.
 10. Looking at the intended grounds of appeal highlighted in paragraph 5 above, we are of the view that the issues raised by the applicant are not idle. Therefore, we are satisfied that the applicant raises arguable grounds which should be determined on merit by way of an appeal.



11. On the nugatory aspect, we do not agree with the argument proffered by the applicant that the intended appeal will be rendered nugatory and the respondent is likely to continue benefiting from use of counterfeit excise stamps hence leading to loss of revenue and unhealthy competition within the sector. The High Court at paragraph 54 of the impugned ruling stated that the orders granted did not in any way stop the applicant from pursuing any outstanding and future tax liabilities from the respondent. We agree with the argument by the respondent that the applicant can continue to discharge its mandate on revenue collection while the respondent resumes its production.
12. From the circumstances of the application, the applicant has satisfied only one limb of the requirements under rule 5(2)(b) of this Court's *Rules*. As the applicant is required to satisfy both the limbs, the Notice of Motion dated May 11, 2021 is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

