



**Kenya Revenue Authority v Amin & 3 others (Civil Application
188 of 2020) [2022] KECA 1067 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1067 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 188 OF 2020
HM OKWENGU, PO KIAGE & J MOHAMMED, JJA
OCTOBER 7, 2022**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

ABDI GEDI AMIN ALIAS ABDI IBRAHIM AHMED 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

CHIEF MAGISTRATE, MOMBASA LAW COURTS 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

*(An application for stay of execution pending appeal from the
Ruling and Orders of the High Court of Kenya at Mombasa (Ogola,
J.) dated 16th June, 2020 in Misc. Application No. 60 of 2020)*

RULING

1. By a motion dated 30th June, 2020 and brought under Rule 5(2)(b) of the [Court of Appeal Rules](#), Kenya Revenue Authority, the applicant, seeks, in the main, the following orders;
2. That the Honourable Court be pleased to grant an Order of Stay of Execution of the Ruling delivered on 16th June 2020 and its consequential orders in Mombasa High Court Judicial Review No.60 of 2019 as against the Applicant pending the hearing and determination of this Application.
3. That the Honourable Court be pleased to grant an Order of Stay of Execution of the Ruling delivered on 16th June 2020 and its consequential orders in Mombasa High Court Judicial Review No. 60 of 2019 as against the Applicant pending the hearing and determination of the intended Appeal.



2. The motion is based on 17 grounds on the face of it and is supported by an affidavit sworn by Godfrey June, a Police Constable seconded to the applicant by the Directorate of Criminal Investigations. The background leading to this application is based on criminal charges that were levelled against the 1st respondent by the applicant in Mombasa Criminal Case No. 1554 of 2019. It was alleged that the 1st respondent failed to pay his taxes by due date and made incorrect statements which affected his tax liability contrary to various sections of the [Tax Procedures Act](#).
3. The 1st respondent then filed a Judicial Review under Miscellaneous Application No. 60 of 2020 and complained that the applicant's decision to charge him without adherence to the law was procedurally wrong and was an infringement of his constitutional right to a fair trial. He sought, among others, an order of certiorari to quash the charge sheet and the incidental proceedings, and prohibition orders against the applicant barring it and its agents from proceeding with the prosecution of the case. By a ruling dated June 16, 2020, the learned judge, E.K Ogola granted the orders sought.
4. Dissatisfied with the whole ruling, the applicant filed a notice of appeal which gives us jurisdiction to hear and determine this application.
5. The applicant complains that the impugned ruling which held that the prosecution of crime perpetrators can only commence upon the exhaustion of arbitral remedies provided for by the law to a taxpayer, effectively prohibited any civil and criminal tax proceedings from running concurrent to the said remedies. This, it is argued, is contrary to Section 193A of the [Criminal Procedure Code](#) as it curtails the enforcement mandate of the applicant on tax compliance through prosecution of those involved in tax fraud.
6. Further, the learned Judge held that a tax demand notice or a tax assessment is a prerequisite prior to charging a person with a tax crime offence thus barring the applicant from prosecuting errant tax payers as envisaged under Section 107 of the Tax Prosecutions Act even in instances where there are deliberate acts of tax fraud. Among other arguments, the applicant is of the view that since the Kenyan tax regime relies on a self-assessment system, the obligation to pay taxes is on individuals and falls due by operation of law, not when the applicant makes a formal demand. It is therefore unjust to require the applicant to give a tax demand in the event of a tax fraud.
7. All these matters are said to demonstrate that the applicant does have an arguable appeal.
8. The applicant next contends that if the stay order is not given, the quashing of the criminal proceedings on this basis may lead to an acquittal of not less than 300 accused persons accused of similar tax crimes in Magistrate's Courts across the country. This will expose the applicant to a plethora of malicious prosecution suits and it will stand to lose a colossal amount of tax payers' funds on its defence. The applicant argued that the prosecution of tax offenders is a matter of public interest, it enhances tax compliance, acts as a deterrence and ensures that everyone pays their fair share of taxes, and this ruling has crippled its mandate to the detriment of the public. This eventuality will render the appeal nugatory, it is urged.
9. In [Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 Others](#) [2014] eKLR the Supreme Court restated the principles to be considered in determining whether a stay order should be granted. An applicant must satisfy the Court that; the appeal or intended appeal is arguable and not frivolous; and that unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory. Moreover, in the context of the dictates and public spiritedness of our Constitution, it added a third limb for consideration which is the public interest in matters that affect members of the public at large.



10. After considering the application, we conclude that the grounds raised by the applicants are arguable and not frivolous. We are satisfied that tax payer stands to lose a colossal amount of money if the stay is not granted. Additionally, the chaos that will be created by the spectra of the acquittal of various criminal charges against individuals suspected of tax fraud before a merit determination of the intended appeal will be detrimental to the applicant and the public at large. The appeal will therefore be rendered nugatory if the stay is not granted. We find that the three limbs have been satisfied.
11. We accordingly grant the injunction and stay of proceedings sought in the motion and order that the stay shall extend to the hearing and determination of the intended appeal.
12. The costs of the motion shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

