



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR, JJ.A)

CIVIL APPLICATION NO. E361 OF 2020

BETWEEN

MADISON INSURANCE COMPANY

KENYA LIMITED..... APPELLANT

AND

COMMISSIONER OF DOMESTIC

TAXES.....RESPONDENT

(An application for injunction and stay of execution pending the appeal from the Judgment of the High Court of Kenya at Nairobi (Gitari, J.) dated 17th September, 2020

RULING OF THE COURT

By their motion dated 02nd October, 2020 and brought under **Rule 5(2)(b)** of the **Court of Appeal Rules**, the appellant, Madison Insurance Company Kenya Limited, seeks the following orders as against the Commissioner of Domestic Taxes, respondent, *inter alia* that;

b) Pending the inter parties hearing and determination of this application, the Honorable Court be pleased to grant an order of injunction restraining the Respondent from executing, enforcing, issuing agency notices or otherwise collecting from the Appellant Kenya Shillings Forty One Million Eight Secen (sic) Thousand Six Hundred Seventy Eight (Kshs. 41,087,678) as per its demand and confirmed Assessment Notice No. 0305200900055/6 dated 3rd September 2012.

c) Pending the hearing and determination of the intended Appeal, the Honorable Court be pleased to grant an order of injunction restraining the Respondent from executing, enforcing, issuing agency notices or otherwise collecting from the Appellant Kenya Shillings Forty One Million Eight Secen (sic) Thousand Six Hundred Seventy Eight (Kshs. 41,087,678) as per its demand and confirmed Assessment Notice No. 0305200900055/6 dated 3rd September 2012.

d) The Honorable Court be pleased to stay the execution of the Judgment and decree of the High Court delivered by the Honorable Justice Mary Kasango on 17th September 2020 pending the inter parties hearing and determination of this application and intended the (sic) Appeal.

The motion is founded on 6 grounds appearing on the face of it and is supported by two affidavits sworn by Lawrence Atonga, the appellant's Counsel and Peter Muturi Ng'ang'a, the appellant's Financial Controller. It was explained that on 23rd June 2017, the appellant filed an appeal at the High Court against the decision of the Tax Appeals Tribunal which upheld the respondent's demand and confirmed the assessment of Kshs. 41,087,678 being the principal corporation tax, interests and penalties thereon. The learned Judge held that the appeal was unmeritorious and therefore dismissed it.

Aggrieved, the applicant filed a notice of appeal which gives us jurisdiction to hear and determine the **5 (2) (b)** application before us.

The applicant avows that it has a valid and arguable appeal and has a reasonable chance of success. The appeal would be rendered nugatory if this application isn't allowed. It was feared that the respondent may issue agency notices to recover the assessed amounts which is the subject of the appeal and this would also expose the applicant to pay similar amounts for a further two financial years if the disputed formula is applied. The appellant would suffer immense loss and prejudice if the orders sought are not granted.

The respondent opposed the application and argued that the applicant had not satisfied the ingredients prerequisite to be warrant granting of

the stay orders. However, the respondent added that in the event that the Court is persuaded to grant the orders, the same ought to be conditional. The appellant should pay at least half of the decretal sum in order to secure the interests of the respondent and the general public as well.

For an appellant to succeed in obtaining relief under **Rule 5(2)(b)** of this Courts **Rules**, it must show that it has an arguable appeal and that if the orders sought, be they of stay of execution or injunction are not granted, the said appeal would be rendered nugatory or useless, illusory, academic and of no effect. For an appeal to be considered arguable, it needs only raise at least one *bona fide* point that calls for a response from the respondent and is worthy of decision by the Court hearing the appeal. See, **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS [2013] eKLR** and **KIENI PLAINS CO. LTD & 2 OTHERS vs. ECOBANK KENYA LTD [2018] eKLR**.

We have considered the application and established that the grounds raised by the appellant are arguable. If the orders sought are not granted, the appellant stands to suffer immense losses and the appeal would be rendered nugatory. Furthermore, the respondent sought for a conditional stay which seeks to have the appellant deposit at least half of the decretal sum. It was confirmed to the Court that at the time of the hearing of this application the appellant had already deposited Kshs. 21,000,000 of the Kshs. 41,000,000 sought.

For these reasons, we find that this application has merit and we therefore allow it. We hereby grant the injunction as sought prayers (b) and (c).

Dated and delivered at Nairobi this 19th day of March, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR