



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, WARSAME, MUSINGA, J.J.A.)**

**CIVIL APPLICATION NO. E325 OF 2020**

**BETWEEN**

**KENYA POSTEL DIRECTORIES LIMITED.....APPLICANT**

**AND**

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

*(An application for injunction stopping an enforcement action by the respondent pending the hearing and determination of the intended appeal against the order of the High Court of Kenya at Nairobi (H.K. Chemitei, J.) dated 31st day of October 2019*

*in*

***HC Income Tax Appeal No. 34 of 2017)***

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**RULING OF THE COURT**

1. The Notice of Motion dated 14th October, 2020 by the applicant is brought under Rule 5(2) (b) of the Court of Appeal Rules, 2010, seeking orders of injunction to restrain the respondent from collecting the Value Added Tax of Kshs. 225, 333, 836 arising from the judgment of the High Court dated 31st October, 2019 in Income Tax Appeal No. 34 of 2017 pending the hearing and determination of the intended appeal.
2. The dispute emanates from the Tax Appeals Tribunal over the conduct and audit of the applicant's tax payments to the respondent. The High Court was tasked with determining in so far as Public Notice No. 37 of 2003 requires refund claims to be **adjusted from VAT 3**, whether legislation prescribes any sanctions in the event of failure to comply with the Public Notice.
3. The variance in tax payments that arose from the applicant's billing system subject to review in six months from the date of the respondent's correspondence dated 18th August, 2003 wherein the applicant would continue to account on cash basis. On consideration of the said issue, the High Court found that firstly, the applicant failed to apply for review of the letter dated 18th August, 2003 hence could not plead legitimate expectation. Secondly, that the applicant failed to comply with the Public Notice No. 37 of 2003 and that the Public Notice does not spell out any sanctions for non-compliance that would result in issuance of a demand for tax equivalent to the amount not adjusted on the return. In the end the High Court dismissed the appeal in favour of the respondent.
4. It is the applicant's case that the intended appeal is arguable on the grounds that the VAT refund claims demanded by the respondent is outside section 11 of the VAT Act and Regulations, 1994. And secondly, that the respondent departed from the agreed billing system, hence the issue of legitimate expectation.
5. On the second limb, it is also the applicant's position that the amount demanded of KShs.225,333,836 is in excess of its assets, which may lead to laying off its employees. Of importance is that the applicant has indicated its willingness to offer security of 5% of the amount demanded to be payable in 10 monthly instalments of KShs.1.12 million.
6. In response, Victor Andambi Chabala on behalf of the respondent deposed that despite the applicant being granted a conditional stay by a ruling dated 15th June, 2020 it failed to comply with the same, which stay has since lapsed. The applicant was required to pay half of the decretal amount, that is, Kshs.110,442, 802.50 and provide a bank guarantee of the outstanding balance within 90 days of the said ruling. The respondent further submitted that the applicant had failed to meet the threshold required in granting the injunctive orders sought. Moreover, it was deposed that the applicant failed to demonstrate that the intended appeal had any chance of success, taking into account that the dispute

had been litigated at two levels of appeal and determined in favour of the respondent. In the end, the respondent urged that the instant application ought to be dismissed with costs.

7. We have considered the arguments, submissions and authorities for and against the instant application. The principles upon which this Court grants reliefs under Rule 5 (2) (b) of the Court's Rules were well settled in the case of Multimedia University & Another v Gitile N. Naituli [2014] eKLR in Civil Application Nai 225 of 2013 (Ur.161/2013) where the court held:-

***“When one prays for orders of stay of execution, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5(2)(b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui vs Tony Ketter & Others [2013] eKLR.”***

(See Daniel Lomagul Kandeï & 2 Others v Kamanga Holdings Limited & 40 Others [2017] eKLR)

8. It is not lost to us that the High Court upheld the outcome of the Tax Appeals Tribunal, essentially dismissing the applicant's case against the respondent. In Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR that ordinarily, an order for stay of execution is an interim order seeking to delay the performance of positive obligations that are set out in a decree as a result of a judgment and the delay of performance presupposes the existence of a positive order. That is, either an order that has not been complied with or has partly been complied with. For this general proposition, the holding of the Court of Appeal of Uganda in Mugenyi & Co. Advocates v National Insurance Corporation (Civil Appeal No. 13 of 1984) stated “.... an order for stay of execution must be intended to serve a purpose”. (See Catherine Njeri Maranga v Serah Chege & Another [2017] eKLR).

9. The purpose in the present application is to preserve the substance of the appeal. Rule 5 (2) (b) of the Court of Appeal Rules, 2010, grants us unfettered discretion to order a stay of execution of an order pending appeal, the only qualification being that we exercise that discretion judicially and not capriciously. That jurisdiction is original. (See Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR).

10. On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. 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. (See Stanley Kangethe Kinyanjui vs Tony Ketter & Others (supra).

11. The High Court in its judgement observed thus;

***“Did the notice contradict the legislation or in other words can one consider it to have been a subsidiary legislation and therefore did not override the main legislation? In my mind the same merely offered guidelines on how the refunds were to be lodged and on what period. The appellant did not demonstrate that it complied with the same and the respondent failed to on its part. There was no such contest on the figures assessed and if there was any of the same could and must always be assessed by the tax experts from either side. As a matter of fact the tribunal seemed not to have been requested to relook into the question of mathematics or figures for that matter. Consequently, under the above issue the appeal fails and the finding of the tribunal is upheld.”***

12. The question of enforceability and applicability of the Public Notice No. 37 of 2003 and that the same did not indicate any sanction for non-compliance are arguable points warranting consideration by this Court on appeal. On the second limb of nugatory aspect, what commends itself to us is the balance between preserving the status quo pending the hearing of the intended appeal and the interest of the respondent who is seeking to enjoy the fruits of its judgment. In the words of the Court in Reliance Bank Ltd (In Liquidation) v Norlake Investments Ltd (2002) 1 EA 227;

***“In determining the second limb of the test, [a court is] bound to consider the conflicting claims of both sides. Where a decree for the payment of money was issued, the inability of the other side to refund the decretal sum was not the only thing that would render the success of the appeal nugatory.”***

13. On our part, we think that to balance the competing interests herein the order that commends itself to us is to grant a conditional injunction. We do so by granting an order of injunction as sought on the condition that the applicant deposits Kshs.11,000,000 with the respondent within 45 days from the date of this ruling; failing which, the conditional injunction shall lapse. Costs shall abide the outcome of the appeal.

**Dated and delivered at Nairobi this 7th day of May, 2021.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**