



**Kenya Revenue Authority v Association (Civil Application
E139 of 2021) [2021] KECA 16 (KLR) (23 September 2021) (Ruling)**

Neutral citation: [2021] KECA 16 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E139 OF 2021
HM OKWENGU, MSA MAKHANDIA & S OLE KANTAI, JJA
SEPTEMBER 23, 2021**

BETWEEN

KENYA REVENUE AUTHORITY APPLICANT

AND

ISINYA EAST SUB-COUNTY BAR OWNERS ASSOCIATION RESPONDENT

*(Being an application for stay of execution pending lodging, hearing and determination
of an intended appeal from the ruling of the High Court at Machakos of Justice
G.C. Odunga delivered on 19th April 2021 in Machakos Petition E005 of 2021)*

RULING

- 1 The Motion before us dated 3rd May, 2021 is brought pursuant to Section 3A and 3B of the [Appellate Jurisdiction Act](#), and Rules 5(2) (b) and 42 of the [Court of Appeal Rules](#).
- 2 The Prayer falling for our consideration is framed thus;

“That this Honorable Court be pleased to grant stay of the conservating (sic) orders of the High Court delivered on 19th April 2021 by Honorable Justice G.V. Odunga pending hearing and determination of the intended appeal in the Court of appeal.”
- 3 In the grounds appearing on the face of the motion it is stated, that the applicant’s statutory mandate to collect taxes will have been interfered with should the stay orders not be granted as approximately Kshs. 21 billion has not been collected as at 20th April, 2021; that the judge issued the conservatory orders despite the fact that the law in question was in place lawfully having gone through all the requisite legal process of enactment thus the applicant will suffer irreparable harm if the same is not lifted. That the applicant has an arguable appeal as can be seen in the draft memorandum of appeal annexed to the application in which they have raised six grounds which grounds are *inter alia*, that the Learned Judge erred in law and in fact: by issuing stay of execution of Section 12D of the Income Tax Act at



an interim stage without the benefit of hearing the merits of the matter; by disregarding the provisions of Article 201 (b) (1) and 210 of the *constitution of Kenya* which require the burden of Taxation to be shared equitably. Finally, that the intended appeal will be rendered nugatory as it will be impossible to collect the lost revenue of approximately Kshs 21 billion.

- 4 The application is further supported by the affidavit of Isaac Kweyu who works with the applicant's Domestic Taxes Department- Policy and Tax Advisory Division. He deposed that Section 12D of the [Income Tax Act](#), was introduced vide Section 4 of the [Finance Act 2020](#) and the Act was assented to and published on 30th June 2020. That as per section 2 of the Act, the commencement date of section 12D was stipulated to be on 1st January, 2021 That the said Act passed through the laid down procedure for the enactment of legislation which was lawful and with public knowledge of its existence for the last nine months. That the process of the enactment of section 12D is not disputed save for its constitutionality. That the applicant has an arguable appeal as the judge misdirected himself by issuing the orders at the interim stage without appreciating the amount of revenue the Government would lose. That the applicant will be unable to recover the taxes in dispute in the event the appeal is unsuccessful. The applicant further deposed that the application has been made without undue delay and if the order is not stayed there will be a substantial effect on collection of income tax which is a major source of revenue necessary for funding Government operations.
- 5 The application is opposed by the respondent vide a replying affidavit of Stanley Njuguna Waweru who deposed as the Chairman of the respondent. He deposes that members of the respondent operate their business in Kitengela, Isinya, Athi River and Mavoko towns within the Kajiado and Machakos Counties. That the application lacks merit, is frivolous, vexatious and aimed at delaying the course of justice as the ruling of Odunga J, was sound and based on the true exposition of the law. That it is the Finance Act 2020 which amended the Income Tax Act by introducing a new Section 12D which introduced minimum tax at the rate of 1% of the gross turnover effective 1st January, 2021 which was an issue of concern. That Section 3 as read with section 15 and the new section 12 D is contrary to and inconsistent with the meaning and purpose of income tax as provided for under the Income Tax Act. That on one hand the Income Tax Act provides that income which is subject to tax under the Income Tax Act is income in respect of gains or profits having deducted all expenditure wholly and exclusively incurred in the production of that income, while on the other hand under section 12D the tax chargeable is on gross turn over with no possibilities of deducting expenses or costs which inconsistency left the respondent and the tax payers at large at a position of uncertainty as to what is applicable to them in respect of income tax. That the inconsistency is both unlawful and contravenes the cardinal rule of legislation. That the impugned tax legislation infringes on various Articles of the constitution and in particular Articles 10, 27, 201 (b) thereof. The impugned legislation is likely to occasion the unlawful imposition of double taxation as against the respondent and other similar taxpayers hence the same should be stayed from being implemented and that's what Odunga J. did by issuing the conservatory orders. That should the application be allowed, the respondent and other enterprises will suffer from the imposition of the illegal and unconstitutional tax. The respondent will suffer untold prejudice as its gross turnover defined under Section 12D would have been subjected to an excessive, discriminative and illegal tax and further the same if enforced will kill their business and the livelihoods of millions of Kenyans operating small and medium enterprises who form majority of the business community.
- 6 Parties filed written submissions to the application. The applicant's submissions merely reiterate and expound the grounds on the face of the application and what is deposed to in the affidavit in support of the application. We need not rehash the same here.



7 The respondent on the other hand submit that the applicant has raised seven grounds of appeal that are frivolous as it had established a case in the High Court that clearly showed infringement of its fundamental rights thus public interest outweighed the enforcement of the legislation. The respondent placed reliance on the cases of *Co-operative Bank of Kenya Limited Vs. Banking Insurance Finance Union (Kenya)* [2015] eKLR and *Stanly Kangethe Kinyanjui Vs. Tony Keter & 5 others* [2013] eKLR to urge the court that the applicant had not made a case for grant of the prayers sought pursuant to Rule 5(2) (b) of the Court of Appeal Rules. That were the conservatory orders to be stayed and the applicant proceeds to implement the impugned legislation whose constitutionality is in issue, the same being non-refundable, the respondent would be greatly prejudiced. On the nugatory aspect, the respondent submits that the applicant has not demonstrated how the suspension of the provisions has prejudiced the Government's ability to conduct its business and that the applicant has elaborate mechanism to recover the tax inclusive of interest and penalties due should the appeal be unsuccessful. That there is no indication by the applicant that there exists a vacuum in law that will prohibit it from realizing the tax should the impugned law be held to be valid.

8 We have carefully considered the application before us, rival submissions by learned counsel and the law. There is a notice of appeal duly filed, which grants this Court jurisdiction to entertain the application. (See: *Ruben & 9 Others v Nderito & Another*, [1989] KLR 459). The principles applicable in the exercise of the Court's unfettered discretion under Rule 5(2) (b) to grant an order of stay of execution are now well settled. Firstly, an applicant has to satisfy that he has an arguable appeal.

However, this is not to say that it must be an appeal that will necessarily succeed at the hearing, 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 of execution is granted the appeal or intended appeal would be rendered nugatory. These principles were restated and amplified by this Court in the case of *Northwood Development Company Limited v Husein Alibhai Pirbhai & 2 others* [2015] eKLR thus:-

“The principles which guide the Court in considering applications made under that rule are now well settled and we need only restate them from *Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd* – Civil Appl. No. Nai. 93/02 (UR), thus: -“Hitherto, this Court has consistently maintained that for an application under rule 5(2) (b) to succeed, the applicant must satisfy the court on two matters, namely:-

1. That the appeal or intended appeal is an arguable one, that is, that it is not a frivolous appeal,
2. That if an order of stay or injunction, as the case may be, is not granted, the appeal, or the intended appeal, were it to succeed, would have been rendered nugatory by the refusal to grant the stay or the injunction.”

9 In addition, both limbs must be satisfied before one can obtain relief under rule 5(2) (b). In the case of *Emirates Airline Limited v Stephen Chase Kisaka* [2015] eKLR, the Court addressed the issue as follows: -

“The first is that the appeal is arguable, and the second is that if the orders sought are not granted, then the appeal would be rendered nugatory. It falls upon the applicant to satisfy the twin principles. See *Republic v Kenya AntiCorruption Commission & 2 others* (supra) where the Court rendered itself thus:

“The applicant needs to satisfy the court, first, that the appeal or intended appeal is not frivolous, that is to say that it is an arguable appeal. Second, the court must also be persuaded that were it to dismiss the application for



stay and later the appeal or intended appeal succeeds, the result or the success would be rendered nugatory. In order that the applicant may succeed, he must demonstrate both limbs and demonstrating only one limb would not avail him the order sought if he failed to demonstrate the other limb.”

- 10 With the above parameters in mind, we are persuaded that the question as to whether the learned Judge erred in law and in fact by issuing conservatory orders staying the implementation of Section 12D of the Income Tax Act at an interim stage and without the benefit of hearing both parties and that the court erred in law and in fact by disregarding the provisions of Article 201 (b) (1) and 210 of the constitution of Kenya which require the burden of taxation to be shared equitably is sufficient to engage the court’s mind on appeal. We accordingly find that the appeal is arguable.
- 11 On the nugatory aspect, whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. Has the applicant demonstrated this nugatory aspect? The learned Judge granted an order staying the enforcement of section 12D which is a new form of taxation which was to apply to the respondents and other citizens at large. The said type of taxation was not said to be a different and distinct one which had stopped all other forms of taxation so that the applicant was unable to collect other taxes.
- 12 We do not actually see why the applicant cannot continue collecting tax from the respondents and the general public using the current tax regime pending the outcome of its appeal. The Government operations are anchored on budgetary allocations which is an annual ritual. We do not see how failure to collect this new tax will impact on Government revenues given that the budget for the year in question is already in place. We are also in agreement with the respondent’s submissions that the applicant can still collect the said taxes if the appeal is successful as there are mechanisms of doing so under the Income Tax Act which is easier vis a vis the amount collected being refunded to each individual contributor if the appeal does not succeed. We are not thus persuaded that the nugatory aspect has not been demonstrated.
- 13 As the applicants are required to demonstrate both limbs, having failed to demonstrate the nugatory aspect consigns this application to the realm of dismissal. Accordingly, and for the foregoing reasons, this application fails and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

