



**Kenya Pipeline Company Limited v Zakhem International Construction Limited; Kenya Revenue Authority & another (Interested Party) (Civil Appeal (Application) E153 of 2021) [2021] KECA 261 (KLR) (3 December 2021) (Ruling)**

Neutral citation: [2021] KECA 261 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL (APPLICATION) E153 OF 2021  
AK MURGOR, HA OMONDI & KI LAIBUTA, JJA  
DECEMBER 3, 2021**

**BETWEEN**

**KENYA PIPELINE COMPANY LIMITED ..... APPLICANT**

**AND**

**ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED ..... RESPONDENT**

**AND**

**KENYA REVENUE AUTHORITY ..... INTERESTED PARTY**

**THE HON. ATTORNEY GENERAL ..... INTERESTED PARTY**

*((An application for stay of execution of the ruling and order of the High Court at Nairobi (Nzioka, J.) given on 16th June, 2020 in Milimani High Court Civil Case No. E322 of 2019))*

**RULING**

1. By a Notice of Motion dated 30<sup>th</sup> April, 2021, the applicant, Kenya Pipeline Company Limited seeks orders that, pending the determination of this application and the intended appeal, this Court stay the execution of the ruling and orders of the High Court (Ngenye, J.) issued on 8<sup>th</sup> April, 2021 and further proceedings in High Court (Milimani Commercial and Tax Division) Case No. E322 of 2019.
2. The application was brought on the grounds that, by a ruling delivered on 16<sup>th</sup> June, 2020, the High Court (Nzioka, J.) entered a partial decree in favour of the respondent, Zakhem International Construction Limited for USD 44,019,024.64; that following the ruling, on 3<sup>rd</sup> September, 2020, the 1<sup>st</sup> Interested Party, the Kenya Revenue Authority (KRA) issued an agency notice on the applicant and its bankers, Standard Chartered Bank Kenya Limited demanding immediate payment of a sum of Kenya shillings 6,199,943,077 as taxes due from the respondent. In default thereof, the applicant would be personally liable for the tax obligation.



3. Thereafter, in another ruling delivered on 6<sup>th</sup> January, 2021, arising from the applicant's application dated 4<sup>th</sup> September, 2020, the High Court directed the applicant to pay the respondent's tax arrears of Kenya Shillings 915,316,830 and Kenya Shillings 484,000,000 (being the principal balance owed after deducting both Kenya Shillings 3,099,971,539 and Kenya Shillings 915,316,830) to KRA; in response, KRA issued another agency notice dated 7<sup>th</sup> January, 2021 on the applicant and its bankers NCBA Bank Limited within which it demanded immediate payment of Kenya Shillings 1,350,316,830 as taxes due from the respondent; that both the sum of Kenya Shillings 3,099,971,539 and Kenya Shillings 1,350,316,830 were paid by the applicant's bankers to KRA on account of the respondent's tax arrears on 22<sup>nd</sup> October, 2020 and on 8<sup>th</sup> January, 2021.
4. It was further contended that on 1<sup>st</sup> February, 2021, the respondent commenced execution of the partial decree and proclaimed against the applicant's movable properties for the sum of USD 7,157,824.77 and Kenya Shillings 4,300. On 5<sup>th</sup> February, 2021, the applicant sought to set aside the warrants of attachment in respect of the decretal sum, arguing that any amounts due to the respondent were already paid to KRA by way of tax arrears. By a ruling delivered on 8<sup>th</sup> April, 2021, the court dismissed the applicant's motion and instead ordered execution against the applicant of the sums claimed. Aggrieved by the ruling, the subject of this application, the applicant seeks to lodge an appeal in this Court and has since filed and served a Notice of appeal. It was contended that the intended appeal raises serious arguable issues with overwhelming chances of success as set out in the draft memorandum of appeal.
5. It was the applicant's case that it stood to suffer substantial loss since the decretal amounts were already been paid to KRA and unless the stay of execution sought is granted, the appeal will be rendered nugatory as the applicant's assets will be sold, and contemporaneously with that, it would be subjected to double payment in view of the respondent's taxes paid directly to KRA.
6. The motion was supported by an affidavit sworn on 30<sup>th</sup> April, 2021 by Stanley Manduku, the applicant's Chief Legal Officer which to a large extent reiterated the averments in the motion as well as by their written submissions.
7. In a replying affidavit sworn on 20<sup>th</sup> May, 2021 by Ermanno Rabiosi, the Chief Quantity Surveyor and Contract Manager of the respondent, it was deponed that the application for stay of execution is unwarranted since it arose from a negative order; that, it was undisputed that the High Court entered a partial decree in favour of the respondent for the sum of USD 44,019,024.64 and that Kenya Shillings 3,099,971,539 was paid as taxes to KRA on 22<sup>nd</sup> October, 2020; that what was in dispute was the balance payable to the respondent and KRA which quantum was settled by the ruling of 6<sup>th</sup> January, 2021 where the trial court ordered that the sum of Kenya Shillings 915,316,830 be paid to the KRA being principal tax arrears, and further that, the balance of Kenya Shillings 485,000,000 be paid to the respondent, upon computation of the outstanding amount at Central Bank of Kenya exchange rate. It was asserted that the applicant had not disputed the amount computed, and therefore the court rightly issued the orders of execution against the applicant for the sums owed to it.
8. The respondent went on to argue that, the draft memorandum of appeal did not raise any arguable issue, and that the applicant has not satisfied the threshold requirement for grant of the orders sought herein.



9. In so far as applications filed under rule 5 (2) (b) of this Court’s rules are concerned, the threshold requirements to be satisfied as exemplified in the case of Republic vs Kenya Anti-Corruption Commission & 2 others [2009] eKLR, are that;

“The Court exercises unfettered discretion which must be exercised judicially. The applicant needs to satisfy the Court that 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 results or success could be rendered nugatory.”

10. Beginning with the first limb of whether the intended appeal is arguable, the applicant’s contention is that the respondent is not entitled to the orders of execution in respect of the respondent’s claims for the reason that the amounts paid to KRA were to clear the respondent’s tax arrears; that if the execution orders were to be effected, its moveable property will be sold, yet the respondent’s claim would have already been settled in the form of payments to KRA.

11. The respondent for its part counters that what is in dispute is the sums claimed less what has been already paid to KRA. As we understand it, the question turns on whether the applicant has paid all amounts it owed to the respondent as tax arrears, and if so whether the respondent is entitled to any further payments in respect of the sums claimed. In our view, this is an arguable issue that requires to be ventilated before this Court.

12. As to whether the intended appeal will be rendered nugatory, we think it will. This is because it is not disputed that the applicant has already paid substantial sums of the respondent’s tax arrears to KRA. What is in contention is whether any further sums are due to the respondent, and if not, whether further payment to the respondent or execution of the court orders against the applicant’s goods will amount to a double payment. Furthermore, in the event that further payments were made to the respondent and the intended appeal were to succeed, the respondent has not told us whether it will have the capability or capacity to refund such amounts. If it cannot, then there is no question that the intended appeal would be rendered nugatory. Given these circumstances, prudence would dictate that any further payments to the respondent be forestalled until the intended appeal is heard and determined.

13. In sum, the two threshold criteria having been met, the motion dated 21<sup>st</sup> June, 2021 is merited, and is allowed. Costs in the appeal.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER, 2021.**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**

**K. I. LAIBUTA**

.....



**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

