



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & SICHALE JJA)

CIVIL APPLICATION NO. 93 OF 2020

BETWEEN

CMA CGM (K) LIMITED.....APPLICANT

AND

THE COMMISSIONER OF DOMESTIC TAXES.....RESPONDENT

(An application for stay of execution pending the lodgment, hearing and determination of an intended appeal from the Judgment, Order and Decree of the High Court of Kenya at Nairobi (Tuiyott, J.) dated 7th February, 2020

in

H.C Income Tax Appeal No. 14 of 2017)

RULING OF THE COURT

The applicant CMA CGM (K) Limited seeks as against the Commissioner of Domestic Taxes (**the respondent**) an order staying execution of the Judgment and decree of the High Court (Tuiyott, J.) dated 7th February, 2020 pending an intended appeal. That judgment dismissed the applicant's appeal to that court that challenged the respondent's assessment and demand for withholding Tax amounting to **Kshs. 299,130,352.00**.

In the grounds on the face of the motion and the supporting affidavit of **Joseph Mwai**, its legal counsel/Manager, the applicant contends that it has an arguable appeal as discernible from its draft memorandum of appeal and that unless the orders sought are granted, the same will be rendered nugatory. Those two are the long-established principles upon the satisfaction of which this Court may intervene by way of interim relief under **Rule 5(2)(b)**. See **STANLEY KANGETHE KINYANJUI vs. TONY KETTER & 5 OTHERS [2013] eKLR**.

The respondent opposed the motion by way of a replying affidavit sworn by one of its officers named **Grace Ibau** stating, in the main, that the High Court did not issue a positive order capable of being stayed, and that the applicant had not demonstrated how it would suffer irreparable harm if the orders sought were not granted. Moreover, the respondent is well able to refund the same or apply the same to offset any tax liability the applicant may accrue.

Given the extra-ordinary times hoisted upon the Court and country by the Covid-19 pandemic, we did not hear argument by the parties but we did carefully consider the application, the rival affidavits, the submissions by counsel for the parties and the authorities cited.

On the question of arguability of the intended appeal, we readily answer in the affirmative. All an applicant needs to show is a single *bona fide* point worthy of appellate interrogation, and it need not be one that will necessarily succeed. It is only frivolous appeals that fail to make the cut. The draft memorandum of appeal is not frivolous. It is noteworthy that the respondent's replying affidavit did not question arguability of the intended appeal.

On whether the appeal would be rendered nugatory, even though what is involved is a sum of money, the same is by no means small. Indeed, the applicant has sworn that unless the stay is granted, it stands a real risk of being forced to close down its operations, breaching contractual obligations, staring at bankruptcy and laying off hundreds of its workers which would amount to injustice and irreparable harm to it.

It is open to us at our discretion to impose terms as we deem just for the grant of an order of stay of execution. The respondent has indeed urged us in its submissions to order, should we grant the application, that the respondent make a deposit of **Kshs. 100 million**.

We have considered this application and now grant the motion on condition that the applicant shall deposit the sum of **Kshs. 50,000,000** (Fifty Million Shillings) into a joint interest bearing account to be opened in the names of counsel on record for the parties. Such deposit shall be made within **60 (sixty)** days of the date hereof, in default of which execution shall issue.

Costs of the motion shall be in the intended appeal.

Dated and delivered at Nairobi this 24th day of April, 2020.

P.O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR