



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KARANJA & ASIKE-MAKHANDIA, JJ.A)

CIVIL APPLICATION NO. 214 OF 2020

BETWEEN

VAN DEN BERG LIMITED.....APPLICANT

AND

THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an application for injunction pending the determination of an intended appeal from the Ruling of the High Court of Kenya at Nairobi (J.M. Bwonwong'a, J.) dated 3rd February, 2020 and delivered by (Hon. Lady Justice P. Nyamweya) on 14th May, 2020

in

JR. Misc. Civil App. No. 165 of 2016)

RULING OF THE COURT

The applicant took out judicial review proceedings in the High Court for orders of *certiorari* and prohibition against the 1st respondent in respect of some tax assessed at Kshs. 1,309,207,399 to be paid by the applicant.

The respondents filed a notice to object to the jurisdiction of the High Court to entertain a tax-related application, contending instead that such application can only be heard by the Tax Appeals Tribunal.

Bwonwong'a, J. heard the objection and upheld it with the result that the judicial review application was struck out with costs to the respondents.

The applicant has filed an appeal within which this application has been brought. Pending the hearing and determination of that appeal, the applicant seeks an order of temporary injunction arguing, in terms of **Rule 5 (2)(b)** of this Court's Rules that the appeal is arguable and secondly, that without an order of injunction, the outcome of the appeal, if successful, will essentially have no worth, given the colossal sum demanded from the applicant.

The respondents' reply to the application is completely misplaced as it is directed, not at this application, but all together at different application not before us; the one for contempt of court and argues that the applicant misunderstood the interim orders issued by this Court pending this ruling; that the applicant understood the order as directing the respondents to lift agency notices placed on the applicant's accounts.

In both its written submissions and a replying affidavit sworn by Isaac Njogu Kariuki, the respondents have urged us to reject the application as having no merit; that the appeal is not arguable as the applicant has, in compliance with the ruling of Bwonwong'a, J. moved to the Tax Appeals Tribunal to challenge the decision of the 1st respondent; and that for that very reason, the appeal will not be rendered nugatory.

As alluded to our role in an application such as this is to consider whether the applicant has demonstrated the existence of an arguable appeal and whether the appeal will be rendered nugatory, should the appeal ultimately succeed without any conservatory measures in place. See **Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 others** [2013] eKLR.

Although the applicant has lodged the appeal on 10 grounds, the only issue is really, whether the High Court lacked jurisdiction to hear the dispute. While that may not be an idle question, subsequent events show that it is not. It was deposed in the respondents' affidavit in opposition to this application and averred in the submissions that subsequent to the impugned decision of the High Court, the applicant filed an appeal before the Tax Appeals Tribunal. This has not been controverted. We have satisfied ourselves from the annexures to the replying affidavit that indeed, the dispute has moved to the Tribunal.

The memorandum of appeal filed by the applicant in the Tribunal makes express reference to Bwonwong'a J's decision as the reason for invoking the jurisdiction of the Tribunal. By that action, the applicant seems to have acknowledged that the Tribunal is perhaps where they should all have started. To engage this Court and the Tribunal at the same time with the same question is, in fact, an abuse of the process of the court.

We do not see how our refusal to issue an injunction will render the appeal nugatory in those circumstances. The application lacks merit and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 6th day of November, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR