IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & KANTAI, JJ.A.)

CIVIL APPLICATION NAI. 200 OF 2019

BETWEEN

COMMISSIONER OF DOMESTIC TAXES..... APPLICANT

AND

PANALPINA AIRFLO LIMITED..... RESPONDENT

(Application for stay of execution pending lodging, hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Nairobi (Okwany, J.) delivered on 31st May, 2019

in

Income Tax Appeal No. 5 Of 2018)

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RULING OF THE COURT

The central issue in the intended appeal is whether services offered by the respondent, **Panalpina Airflo Limited** through its agent or client, **Panalpina Airflow BV**, a company incorporated in the Netherlands which offers transport, logistical and freight services are subject to withholding tax. Those services also include x-raying of flowers to verify their particulars as set out by exporters; vacuum cooling of the flowers to ensure they are moist free prior to exportation; cold room packing and storage of the flowers in accordance with airline specifications; and preparation of documentation necessary for the export of flowers.

The respondent claimed that those services were zero-rated under the Value Added Tax Act but the applicant, **COMMISSIONER OF DOMESTIC TAXES**, did not agree.

When the respondent applied for VAT refunds in various sums the applicant insisted that the respondent pay tax. The respondent filed an objection under the VAT Act and the dispute ended up at the Value Added Tax Appeals Tribunal in accordance with the said Act which ruled that tax was collectable by the applicant as the same was not zero-rated. The respondent appealed and in a judgment delivered by Okwany, J. on 31st May, 2019 the learned Judge disagreed with the holding of the Tribunal. The Honourable Judge set aside that judgment holding that the respondent was entitled to VAT tax refunds.

The Motion is brought under various provisions of law including **rule 5(2) (b)** of the **Rules of this Court** to order a stay of execution of that judgment and orders flowing therefrom, pending the hearing of an intended appeal. It is said in grounds in support of the Motion and in a supporting affidavit of **Geoffrey Korir**, an **Assistant Manager, Refunds Office** of the applicant, that the intended appeal is arguable. It is said that the Tribunal had ruled in favour of the applicant, whose sole role is to collect tax to fund public services in Kenya, that the effect of the judgment of the High Court will have adverse consequences as the applicant will be unable to collect tax in the industry covered by the respondent. It is also said that the applicant will suffer irreparable loss of revenue, as it will be impossible to recover lost revenue from various exported services if the intended appeal succeeds.

Peter Kristenses, a director of the respondent, resists the application in a replying affidavit sworn at Nairobi on 4th September, 2019. He

says that there is no positive order in the judgment of the High Court capable of execution, thus, in his view, as advised by his lawyers, we have no jurisdiction to grant the orders prayed. He further depones that the intended appeal is not arguable and would not be rendered nugatory if stay orders are not granted. He sets out the history of the matter before the Tribunal and High Court which we have already set out.

We heard oral arguments when the Motion came up for hearing before us on 19th September, 2019. For the applicant was learned counsel **Miss Janet Lavuna,** while the respondent was represented by learned counsel **Mr. W.A. Amoko** who was assisted by **Miss Lena Onchwari**. Miss Lavuna urged us to allow the application so that the applicant is not made to make a refund of tax, which the High Court decreed. According to counsel, there are conflicting decisions on what amounts to exported services in the flower industry and this Court should harmonize the position by stating the correct position in law. Counsel further submitted that the effect of the judgment subject of the appeal will lead to players in the flower industry who have been paying taxes to ask for tax refunds and the applicant would be unable to collect taxes, its core mandate.

In opposing the Motion, Mr. Amoko submitted that services offered by the respondent were zero-rated and the respondent was entitled to a refund of tax. According to him there was no positive order issued by the High Court and we have no jurisdiction in the premises, the respondent not having taken any step to enforce the orders of the High Court.

In a rejoinder, Miss Lavuna submitted that the High Court, in ordering a refund of tax had made a positive order and there was jurisdiction to order a stay of execution.

The principles that govern grant or refusal to grant orders of stay of execution pending appeal are well known and are well settled in our jurisdiction. For an applicant to succeed in such an application he must show that the appeal, or intended appeal, as the case may be, is arguable, which is to say that it is not frivolous. If that applicant succeeds on that limb he has the additional duty to demonstrate that, absent stay, the appeal, or intended appeal, would be rendered nugatory. These principles have been captured in various decisions of this Court, and in one of them, **Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR** the position was summarized as follows:

> ***"i) In dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this Court.***
>
> ***ii) The discretion of this Court under Rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.***
>
> ***iii) The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.***
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> ***iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances.***
>
> ***v) An applicant must satisfy the Court on both of the twin principles.***
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> ***vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.***
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> ***vii) 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.***
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> ***viii) In considering an application brought under Rule 5 (2) (b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.***
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> ***ix) The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.***
>
> ***x) 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."***

We have considered the submissions made by the parties before us.

A perusal of the draft Memorandum of Appeal on record shows that the applicant questions the judge of the High Court for not holding that services offered by the respondent were exported services and were not zero-rated under the VAT Act 2013. The applicant also wants an interpretation of the definition of **"exported services"** under the said Act and what constitutes **"consumed in Kenya"** – whether those services are subject to tax or not. These, to us, are arguable points and the position, as we have seen, is that a single arguable point will do as an applicant need not raise a multiplicity of arguable points to be enlisted to the protection of a stay of execution under **rule 5(2)(b)** of the **rules** of this **Court.** Again, as we have seen, an arguable point is not a point that must succeed.

Miss Lavuna tells us that the effect of the judgment of the High Court is that players in the flower industry will all demand a refund of tax which is zero-rated. It is the duty of the applicant to collect tax and if industry players stop paying tax and demand refunds, this may very

well create chaos in the tax collection system. We think, it will do justice to the case that the status remain pending the resolution of the issues raised in the intended appeal. Such chaos would render the intended appeal nugatory. The judgment of the High Court constitutes issuing a positive order in that the applicant has been ordered to make a refund of tax to the respondent. We agree with Miss Lavuna, learned counsel for the applicant, that the order is one that we have jurisdiction to stay. Thus the applicant before us has satisfied both limbs of the principles on which we act in an application such as the one before us. In the premises, therefore there shall be a stay of execution of the orders of the High Court issued on 31st May, 2019 pending the intended appeal. Costs of the Motion will abide the intended appeal.

Dated and delivered at Nairobi this 20th day of December, 2019.

M. WARSAME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR