



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & ODEK, JJA)

CIVIL APPLICATION NO. 111 OF 2015 (UR 88/2015)

In the matter of an intended appeal

KENYA ASSOCIATION OF STOCK BROKERS AND INVESTMENT BANKS...APPLICANT

AND

THE ATTORNEY GENERAL 1ST RESPONDENT

THE KENYA REVENUE AUTHORITY 2ND RESPONDENT

(An application for stay of enforcement action pending the lodging, hearing and determination of an appeal from the decision of the High Court of Kenya at Nairobi in Milimani by (Mumbi Ngugi, J) dated 20th March 2015

in

H.C. PETITION NO. 22 OF 2015)

RULING OF THE COURT

The applicant, **KENYA ASSOCIATION OF STOCK BROKERS** filed a Notice of Motion dated 28th April, 2015 and sought, *inter alia*, the following orders:-

“1. THAT there be a stay of any enforcement action to be taken by Kenya Revenue Authority, the 2nd Respondent herein with regard to the collection and remittance of capital gains tax as provided for under section 10 and 23 of the Finance Act, 2014 pending the hearing and determination of this application.

2. THAT there be a stay of any enforcement action to be taken by Kenya Revenue Authority, the 2nd Respondent herein with regard to the collection and remittance of capital gains tax as provided for under section 10 and 23 of the Finance Act, 2014 pending the hearing and determination of the intended appeal.

3. THAT The Kenya Revenue Authority, the 2nd Respondent herein, be restrained from commencing, instituting or proceeding with any enforcement action against taxpayers and

specifically members of the Applicant in relation to and/or on account of their failure to file returns on and/or pay taxes charged under section 10 and 23 of the Finance Act, 2014.”

In the Motion, the Attorney General and the Kenya Revenue Authority were named as the 1st and 2nd respondents respectively.

The background to the Notice of Motion is that the applicant, the then petitioner filed a constitutional petition dated 26th January, 2015 against the two respondents herein challenging the constitutionality of Sections 10(9) and 23 of the Finance Act, 2014. Contemporaneously with the filing of the petition, the Petitioner filed a Notice of Motion on the same day i.e. 26th January 2015 under Rule 23(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and under the Inherent powers of the Court. In the Motion, the applicant sought, *inter alia*,

“3. The Kenya Revenue Authority, the 2nd Respondent herein, be restrained from commencing, instituting or processing with any enforcement action against taxpayers and specifically members of the Applicant in relation to and/or on account of their failure to file returns on and/or pay taxes charged under section 10 and 23 of the Finance Act, 2014.

4. The costs of and incidental to this application abide the result of the said appeal.”

However, for expediency purposes the parties dispensed with the Motion thus paving way for the hearing of the petition on 16th February 2015 by Mumbi J. On 20th March 2015 Mumbi J delivered the judgment and dismissed the applicant’s petition. The applicant was aggrieved by the said outcome and filed a Notice of Appeal dated 1st April, 2015 and the Motion before us seeking orders of stay pending the hearing and determination of the intended appeal.

The Motion is supported by the affidavit of **WILSON NJOROGE NGUGI**, the Chief Executive Officer of the applicant. In an affidavit dated 28th April 2015 he deposes that on 13th April 2015 the applicant filed an application for review in the High Court; that the review is with regard to a specific aspect of the judgment which does not prejudice the applicant’s intended appeal before this Court; that it is apprehensive that the 2nd respondent is likely to take enforcement action against the applicant’s members for the collection and remittance of Capital Gains Tax (CGT); that the applicant’s members are merely facilitators in the Nairobi Securities Exchange and are not taxpayers to be subjected to enforcement under Section 10(9) and 23 of the Finance Act, 2014; that there are practical challenges with regard to collection and remittance of Capital Gain Tax especially with regard to marketable securities which are traded electronically; that the provisions of the Finance Act are vague and contradictory and finally that the applicant’s members stand to suffer irreparable loss and damage unless an order of stay is granted. In a supplementary affidavit sworn on 29th June 2015 the deponent further deposed that the 2nd respondent had made demands to the applicant’s members vide its letter of 30th April 2015 demanding that they pay Capital Gain Tax, failing which enforcement action would be taken against them; that on diverse dates between 2nd June 2015 and 5th June 2015 the 2nd respondent made demands to some members of the applicant to pay Capital Gain Tax in terms of assessment contained in the demand letters; that the 2nd respondent is not capable of calculating Capital Gain Tax and has made an estimate of the taxes; and finally, that some of the demands are standard figures and yet it is impossible for the stock brokers to yield exactly the same Capital Gain Tax earnings.

In opposition to the motion, **EVANS NYAKANGO** on behalf of the 2nd respondent swore an affidavit dated 30th June 2015. He deposed that the applicant lacked capacity to contest the individual demands made to its members; that the applicant’s mandate is confined to lobbying, the welfare of its members and networking on behalf of its members and that the applicant’s members shall not suffer prejudice as the 2nd respondent is capable of making refunds should the Court so direct. He further deposed that the 2nd respondent stood to suffer prejudice if the tax is not collected and remitted within time as the same would attract penalties and interest.

The motion came before us for hearing on 22nd July 2015. Mr. Kiragu Kimani, learned counsel for the applicant, urged us to find that they have an arguable appeal as it was intended to challenge the enactment of the Finance Act on the basis that the statutory instruments and Article 201 of the Constitution that calls for public participation were not adhered to. He was of the view that under Article 201 of the Constitution there has to be openness and accountability in all matters of public finance and that the learned judge erred in finding that Parliament represented the public and further that in any event there were changes made on the bill on the floor of the house and these changes were not subjected to public scrutiny.

It was Mr. Kiragu's further contention that unless stay was granted, the 2nd respondent would collect taxes as it had already made demands and that the 2nd respondent was not in a position to determine the tax payable hence its uncertainty.

It was Mr. Kiragu's further submission that failure to pay the tax would attract penal consequence as well as attachment. In conclusion, Mr. Kiragu urged us to find that the applicants are in a position to pay the taxes if eventually ordered to do so unlike the 2nd respondent who would make refunds but without interest. He relied on the following authorities: ***Stanley Kangethe Kinyanjui v Tony Ketter & 5 others (2013) eKLR; James Mbatia Thuo & Another v Kenya Railways Corporation & Another [2015] eKLR ; Ruben & 9 Others v Nderitu & Another (1989) KLR 365; Ahmed Musa Ismael v Kumba Ole Ntamorua & 4 Others [2014] eKLR; Lloyd's Introduction to Jurisprudence by MDA Freeman edition 8 pages 154-161.***

Mr. Bitta, learned counsel for the 1st respondent conceded that the applicant has an arguable appeal but refuted the applicant's assertion that the appeal would be rendered nugatory unless stay is granted. According to him, 60% of the investors are foreigners and that the applicant is an inter-mediary for purpose of collection of taxes from foreign as well as local investors; that 2nd respondent has perpetual existence and hence it shall make refunds should it be necessary; that the tax payable is quantifiable; that the applicant is not seeking to stay the operations of sections 10 (9) and 23 of the Finance Act but are seeking an order to stop the 2nd respondent from collecting taxes inspite of the law existing provisions of the law and finally that ever since Mumbi, J delivered her judgment, the 2nd respondent has not enforced penal consequences and hence the applicant's fears were unfounded.

Mr. Ontweka learned counsel for the 2nd respondent associated himself with the submissions of the 1st respondent. He reiterated that the 2nd respondent would be in a position to make prompt refunds of the taxes if the applicant's appeal was to be successful; that the law took effect on 1st January 2015 and is operational; that if the investors do not pay taxes, it would be difficult to enforce compliance as 60% of the investors are foreigners. He concluded by submitting that there was public participation in formulation of this law.

In a brief rejoinder, Mr. Kiragu submitted that the applicant was apprehensive that the 2nd respondent would go after the applicant's members who are merely intermediaries.

As was stated in **Stanley Kangethe Kinyanjui v Tony Keter & 5 others [2013] eKLR** “ ***The principles which the court will follow in determining an application for injunction or stay of execution under Rule 5 (2) (b) of the Court of Appeal Rules are twofold. The court has to decide first; whether the applicant has presented an arguable appeal and second, whether the intended appeal will be rendered nugatory if these interim orders were denied.***”

The first issue for our determination is whether the applicant has an arguable and not frivolous appeal.

In **Kenya Tea Growers Association & Another vs Kenya Planters &**

Agricultural Workers Union Civil Application No. Nai. 72 of 2001 this Court addressed itself on what is considered to be an arguable appeal thus,

“He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision.”

It is trite too that demonstration of the existence of even one arguable point will suffice in favour of the applicant. (See **Kenya Railways Corporation vs Edermann Properties Ltd., Civil Appeal No. Nai. 176 of 2012** and **Ahmed Musa Ishmael vs Kumba Ole Ntamorua & 4 Others, Civil Appeal No. Nai. 256 of 2013**).

The applicant intends to challenge the formulation of Sections 10(9) and 23 of the Finance Act. Its bone of contention is that it was not formulated as per the dictates of the law. This in our view is a *bonafide* question to be determined on appeal. We also note that Mr. Bitta conceded that the applicant may have an arguable appeal. On our part we are prepared to assume without making any definitive statements, that the intended appeal is arguable and not frivolous.

The second limb for consideration is whether the intended appeal would be rendered nugatory if the stay order is refused. In **Reliance Bank Ltd. vs Norlake Investment Ltd. (2003) IEA 232**, this court pronounced itself thus:

“What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. Whether or not the success of an appeal or intended appeal will be rendered nugatory is a question of fact not law. Each case must therefore be considered on its own peculiar facts and circumstances and there is no limit to the number of factors that may be considered in the process of exercising the Court’s discretion.”

It was the applicant’s case that the 2nd respondent would not make the refunds plus interest if their appeal was to be successful. On the other hand the respondents argued that 60% of the investors are foreigners and it would be impossible to enforce payment in view of the geographical jurisdictions of the investors.

We have considered the rival submissions and the concerns raised by both the applicant and the respondents and we have come to the conclusion that this is a case befitting an order for conditional stay. Accordingly, we order that a stay is hereby granted on condition that the applicant deposits 20% of the taxes demanded from the applicant’s members by the 2nd respondent. The said taxes to be invested in treasury bills in the joint names of the applicant and the 2nd respondent, pending the hearing and determination of the intended appeal.

Given the peculiar circumstances of this appeal, we order that costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 9th day of October, 2015.

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR