



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: P. KIHARA KARIUKI, PCA, M'INOTI & MURGOR, JJ.A.) CIVIL APPLICATION  
NO. NAI 161 OF 2014 (UR 125/2014)**

**BETWEEN**

**WANANCHI GROUP KENYA LIMITED.....APPLICANT**

**AND**

**COMMISSIONER FOR INVESTIGATIONS & ENFORCEMENT.....RESPONDENT**

*(Application for stay of execution pending the lodging, hearing and determination of an intended appeal from the judgment and decree of the High Court of Kenya at Nairobi (Odunga, J.) dated 7<sup>th</sup> February, 2014*

in H.C.MISC.APP. NO. 51 OF 2013)

\*\*\*\*\*

**RULING OF THE COURT**

On 7<sup>th</sup> February, 2014, the High Court, (*Odunga, J.*) dismissed with costs an application for judicial review by *Wananchi Group Kenya Ltd (the applicant)*, in which it had sought, as against the *Commissioner for Investigation and Enforcement (the respondent)*, two reliefs as follows:

- 1. An order of certiorari to quash a decision of the respondent's dated 7<sup>th</sup> February 2013 appointing the applicant's bankers, Messrs. Commercial Bank of Africa, an agent for purposes of collecting from the respondent Kshs 124, 866,992.80 alleged to be due and payable tax;***
- 2. An order of prohibition to stop the respondent from demanding from the applicant Value Added Tax on items in respect of which the applicant had received remission of tax from the Minister for Finance pursuant to section 23 of the Value Added Tax Act, Cap 476.***

Aggrieved by the dismissal of the application, the applicant filed a ***Notice of Appeal*** on 11<sup>th</sup> February, 2014 and followed it up with the Notice of Motion now before us, taken out principally under ***rule 5(2) (b) of the Court of Appeal Rules*** and seeking the following two substantive prayers:

- "1. That pending the hearing and determination of the intended appeal from the judgment and order of the High Court at Nairobi dated 7<sup>th</sup> February, 2014 there be a stay of execution and or enforcement of the decision and order dated 7<sup>th</sup> February, 2013; and***
- 2. That this Honourable Court do grant such other appropriate relief relating to the decision and***

***order in question as the justice of the circumstances herein may dictate.”***

The background to the application is not in dispute. The applicant is a telecommunications service provider in Kenya. To expand its business and in particular to bolster its digital television and fiber-optic cable services, the applicant invested in network infrastructure entailing importation of the relevant telecommunication equipment and hardware. Between June 2007 and December 2011 the applicant applied and obtained from the Minister for Finance **Value Added Tax (VAT)** remission in respect of the imported equipment and hardware. The remission was granted pursuant to the provisions of **section 23** of the **Value Added Tax Act**, and was subject to a condition which was worded as follows:

***“NOTE: Spares and accessories do not qualify for this remission.”***

The relevant part of section 23 of the Act provides as follows:

***“(1) Subject to subsection (3), the Minister may, by order in the Gazette, remit wholly or partly tax payable in respect of any taxable goods or taxable services, if he is satisfied that it is in the public interest to do so.***

***2. Where any remission is granted under this section on a condition that tax shall be payable in the event of the breach of any term or condition or on the occurrence of any event, the tax shall, on the breach of that term or condition or on the occurrence of that event forthwith become due and payable by such persons as may be specified in the order concerned.”***

Section 23(3) to which Section 23(1) is subject provides among other things that the remission allowed under section 23(1) shall apply only in respect of ***capital equipment and machinery imported or purchased solely for use in the manufacture of goods in a licensed customs bonded factory for export only.***

In early 2012 the respondent carried out a compliance audit, which *inter alia*, entailed evaluating the applicant’s import duty and VAT remission. He concluded that the applicant had not complied with the conditions upon which the Minister had granted remission and had instead imported non-qualifying goods, namely decoders and set top boxes which the respondent classified as spares and accessories. On 6<sup>th</sup> March 2012, the applicant demanded from the applicant payment of the sum of **Kshs 124,866,992.80** being the total VAT due on the said non-qualifying goods. In response to queries from the applicant’s tax agents, the respondent, on 27<sup>th</sup> April 2012 explained in detail the basis of his decision to classify decoders and set top boxes as spares and accessories rather than as capital equipment and machinery.

Subsequently, the applicant raised more queries, which the respondent answered, before the parties entered into negotiations to settle the matter amicably. Pursuant to those negotiations the applicant paid to the respondent **Kshs 25,669,992.80** but eventually the negotiations fell through, resulting in this litigation.

In support of the application for stay of execution, the applicant relied on the supporting affidavit sworn on 2<sup>nd</sup> July 2014 by **Wambui Maina**, its legal officer, as well as a memorandum of appeal containing 9 grounds of appeal upon which the judgment of the High Court will be impugned, among them being misapprehension of the applicant’s case by the High Court and incorrect exercise of discretion by the learned judge.

Before us, **Mr. Peter Gachuhi**, learned counsel for the applicant submitted that the applicant’s intended appeal was arguable because by demanding payment of VAT from the applicant, the respondent had acted illegally and in excess of jurisdiction. Under section 23 of the Value Added Tax Act, it was contended, the Minister had power to grant tax remission, which he had lawfully done in favour of the applicant. Such a decision of the Minister to grant tax remission, it was further contended, could not in law be countermanded by the respondent.

In learned counsel’s view, by making the tax demand, the respondent was effectively challenging the decision of the Minister to grant the applicant remission, which the respondent had no power to do. Mr.

Gachuhi argued that the respondent had not appealed to the Minister to cancel or vary the applicant's tax remission. Consequently it was submitted that the tax demand by the respondent was a challenge to the decision of the Minister and was therefore unlawful, illegal and in excess of jurisdiction and ultimately amenable to be quashed by an order of certiorari and stymied by an order of prohibition.

On whether the intended appeal, if successful would be rendered nugatory, learned counsel submitted that since the respondent's tax demand was illegal, the applicant ought not to be required to make a tax payment that lacked legal basis. Payment of the demanded amount, it was contended, would be onerous to the applicant and would occasion it substantial loss and damage. Relying on **BUTT V. RENT RESTRICTION TRIBUNAL (1982) KLR 417**, counsel submitted that the power to grant or refuse an application for stay of execution is a discretionary power, which should be exercised in such a way as to avoid defeating an appeal.

Mr. Gachuhi urged us to grant an order of stay of execution, notwithstanding the fact that the High Court had only dismissed the application before it without making any positive order requiring the applicant to do or refrain from doing anything. In counsel's view, the decision of the predecessor of this Court in **WESTERN COLLEGE OF ARTS & APPLIED SCIENCES V. ORNAGA & OTHERS (1976) KLR 63** which held that the Court has no jurisdiction to issue an injunction pending appeal where there was nothing in the order of the High Court to be enforced, was distinguishable as it arose from a suit rather than judicial review proceedings. It was submitted on the authority of **COMMISSIONER OF LANDS V. KUNSTE HOTEL LTD, CA NO. 234 OF 1995** that judicial review is a special jurisdiction and therefore the order sought by the applicant could issue.

The respondent opposed the application on the basis of an affidavit sworn on 15<sup>th</sup> July, 2014 by **Kamau Kamau**, the respondent's revenue officer responsible for investigations, tax assessment and compliance audits. **Mr. Collins Wanderi** and **Mr. Pius Nyaga**, learned counsel for the respondent contended that this Court lacked jurisdiction to entertain the application on four fronts.

Firstly, it was submitted that the applicant had already filed an application for stay of execution in the High Court, which was heard and dismissed on 30<sup>th</sup> June 2014. Having unsuccessfully sought before the High Court exactly the same prayers as those sought in this application, it was submitted the applicant was trying to have a second bite of the cherry and was therefore abusing the process of the court.

Secondly, we were urged to find that stay of execution could not issue in judicial review proceedings and that under **sections 8 and 9 of the Law Reform Act** the applicant's only remedy is to lodge an appeal.

Thirdly, learned counsel for the respondent urged that stay of execution is a form of injunction which by virtue of the provisions of **section 3(2) of the Kenya Revenue Authority Act, cap 469** and **section 16(1)(i) of the Government Proceedings Act, cap 40** could not issue against the respondent.

Lastly it was contended that the order of the High Court that the applicant sought to stay was a negative order, which had merely dismissed the applicant's application, without requiring any of the parties to do anything or refrain from doing anything. In those circumstances, it was submitted there was no order capable of being stayed under the powers donated to this Court by rule 5(2)(b).

Counsel concluded by submitting that the applicant had failed to demonstrate an arguable appeal, which would be rendered nugatory. In any event, we were told, the balance of convenience tilted in favour of the respondent which has a legal duty to collect taxes and that an order of stay of execution would cause more hardship even to the applicant itself since interest and penalties would continue to accrue. In the event that the intended appeal was successful, counsel contended, the respondent would be in a position to refund the taxes paid by the applicant or offset the same against its present or future tax liability.

We have duly considered the application, submissions by learned counsel and the authorities cited. We shall first dispose of the jurisdictional issues raised by the respondent. The jurisdiction of this Court under rule 5(2)(b) is invoked by the filing of a notice of appeal and is a jurisdiction that is original, independent and unfettered. In exercising that jurisdiction, the Court considers the matter *de novo* and is not

constrained by considerations of whether or not an applicant has previously sought an order of stay of execution in the High Court. Being an original and independent jurisdiction, the Court is not dealing with an appeal on the exercise of discretion by the High Court. (*See GITHUNGURI V. JIMBA CREDIT CORPORATION LTD (NO. 2) (1988) KLR 838* and *EQUITY BANK LTD V. WESTLINK MBO LTD, CA NO NAI. 78 OF 2011*). Accordingly there is no substance in the argument that the application before us cannot be entertained on account of the applicant's unsuccessful application for stay of execution in the High Court. Nor do we find any merit in the argument that this Court cannot issue an order of ***stay of execution*** in an application arising from judicial review proceedings. The law reports are replete with authorities and precedent where this Court has issued such orders to require specific mention. The case of *STANBIC BANK KENYA LTD V. KENYA REVENUE AUTHORITY, CA NO NAI 294 OF 2007* which the respondent cited and which was followed in *METRO PHARMACEUTICALS LTD VS KENYA REVENUE AUTHORITY, CA NO NAI 131 OF 2012* involved an application for ***injunction*** rather than an application for stay of execution and on that basis the Court held that on account of the provisions of ***section 3(3) of the Appellate Jurisdiction Act***, an injunction, which is not one of the remedies available in judicial review applications under the ***Law Reform Act***, cannot be issued in an application under rule 5(2)(b) arising from judicial review proceedings. Stay of implementation of an impugned decision is one of the remedies available under the Law Reform Act and we hold that the remedy of stay of execution is consequently available under rule 5(2)(b) in applications arising from judicial review proceedings.

In the application before us, the applicant seeks stay of execution rather than an injunction. The respondent is not correct when it argues that the application for stay of execution is akin to an injunction. On the distinction between an injunction and an order of stay as pertains to judicial review, *Glidewell, LJ* speaking for the Court of Appeal in *R V. SECRETARY OF STATE FOR EDUCATION AND SCIENCE EX PARTE AVON COUNTY COUNCIL, (1991) 1 All ER 282* at P. 285 stated as follows:

***“When correctly analyzed, however, the apparent similarity (between an injunction and an order of stay) disappears. Proceedings for judicial review, in the field of public law, are not a dispute between two parties, each with an interest to protect, for which an injunction may be appropriate. Judicial review, by way of an application for certiorari, is to challenge the way in which a decision has been arrived at. The decision maker may appear to argue that his, or its decision was reached by appropriate procedure. But the decision-maker is not in any true sense an opposing party, any more than the inferior court whose decision is challenged is an opposing party. Thus the distinction between an injunction and a stay arises out of the difference between the positions of the persons or bodies concerned. An order that decision of a body whose decisions are open to challenge by judicial review shall not take effect until the challenge has finally been determined is, in my view correctly described as a stay.”***

There is however, in our opinion, considerable merit in the respondent's contention that the High Court did not make any order that is capable of being stayed by an order of stay of execution. Besides *WESTERN COLLEGE OF ARTS & APPLIED SCIENCES V. ORNAGA & OTHERS* (supra), which we are not satisfied has been convincingly distinguished by the applicant, there are numerous decisions of this Court where it has been consistently held that no order of stay of execution can be made where the High Court has only dismissed an application for judicial review. Thus, for example, in *DEVANI & 4 OTHERS V. JOSEPH NGINDARI & 3 OTHERS, CA NO. NAI 136 OF 2004*, the High Court dismissed an application for judicial review and the applicant applied under rule 5(2)(b) for stay of execution of the order of the High Court. In holding that the application was incompetent, the Court stated:

***“By dismissing the judicial review application the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted it will have the indirect effect of reviving the dismissed application.”***

Subsequently in *EXCLUSIVE ESTATES LTD V. KENYA POSTS AND TELECOMMUNICATIONS CORPORATION & ANOTHER (2005) 1 EA 53* this Court expressed itself as follows on the issue at hand:

***“The stay of execution envisaged by rule 5(2) (b) of the rules of this Court is the execution of a decree or order capable of execution in any of the methods stipulated by section 38 of the Civil Procedure Act. A “decree holder” as defined in section 2 of the Civil Procedure Act:***

***“means any person in whose favour a decree has been passed or an order capable of execution has been made and includes the assignee of such decree or order.”***

***The order which dismissed the suit was a negative order which is not capable of being executed.”***

This reasoning was further applied and upheld in MOMBASA SEAPORT

DUTY FREE LIMITED V. KENYA PORTS AUTHORITY, CA NO. NAI. 242 OF 2006 where it was stated:

***“In this case, the Superior Court merely upheld the preliminary objection and as a consequence struck out the application for judicial review with costs. The order striking out the application is not capable of execution against the applicant.”***

More examples can be quoted, including STANBIC BANK KENYA LTD V. KENYA REVENUE AUTHORITY (supra), REPUBLIC & 4 OTHERS V. WATER BOARD & 3 OTHERS, CA NO 308 OF 2008, FRS V. JDS, CA NO. NAI. 114

OF 2012 (UR 89/2012), F & S. SCIENTIFIC LTD. VS. KENYA REVENUE AUTHORITY & ANOTHER, CA NO. 260 OF 2012, METRO PHARMACEUTICALS LTD VS KENYA REVENUE AUTHORITY (supra) and MARANGU RUCHA & ANOTHER V. ATTORNEY GENERAL & 10 OTHERS CA NO. 180 OF 2013 (UR 127/2013).

The applicant, well aware that a stay of execution will not issue in respect of a negative order has prayed the Court to grant it such other relief as the Court should deem appropriate in the circumstances of this case. In TOTAL KENYA LTD V. KENYA REVENUE AUTHORITY, CA NO NAI 135 OF 2012 (UR 101/2012) this Court expressed the view that although under Rule 5(2)(b) the Court can only issue orders of injunction, stay of execution or stay of proceedings, nevertheless in a suitable case the Court is not precluded from making any other conservatory orders under its inherent jurisdiction. In that case the Court accordingly ordered maintenance of the prevailing status quo.

Similarly in SAMIYAN KAUR DAVINDER SINGH VS SPEEDWAY INVESTMENTS LTD & ANOTHER, CA NO 194 OF 2014 (UR 153 OF 2014),

the Court expressed itself thus:

***“In addition to rule 5(2) (b) the applicant has also invoked rule 1(2) of the Court of Appeal Rules, 2010 which provides that nothing in the Court of Appeal Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In the circumstances of this case, we do not consider the applicant’s prayer for an order for maintenance of the status quo pending the hearing and determination of the intended appeal fatal. If we are satisfied that the ends of justice will be best served by issuing a preservative order pending the hearing and determination of the intended appeal, we have a basis under Rule 1(2) to issue such an order. (See DHIMAN V. SHAH (2008) KLR, 165 and STANBIC BANK KENYA LIMITED V. KENYA REVENUE AUTHORITY, CA No 294 of 2007).”***

Whether ultimately the applicant is entitled to the remedy that it seeks is dependent on whether it has established an arguable appeal, which will be rendered nugatory if a remedy is not granted. (See REPUBLIC VS MUNICIPAL COUNCIL OF MOMBASA & 2 OTHERS EXP. ADOPT A LIGHT LTD, CA NO 15 OF 2007).

While bearing in mind that an arguable appeal is not necessarily one that must succeed but rather is an appeal that raises even a single bona fide point worth of consideration by this Court(see **KENYA RAILWAYS CORPORATION V. EDERMANN PROPERTIES LTD, CA NO. NAI. 176 OF 2012**), we are far from satisfied that we have such a case before us. The applicant’s “arguable appeal” is founded on the argument that the tax demand by the respondent is illegal and in excess of jurisdiction since it purports to reverse or overrule the decision of the Minister to grant tax remission. The respondent’s answer, however, which was affirmed by the High Court, was that the respondent had not purported to overrule the Minister. On the contrary, all that the respondent had done as the body responsible under the law for compliance was to enforce the conditions upon which the Minister had granted the applicant tax remission.

It is not in dispute that the remission of VAT that the Minister for Finance granted the applicant was subject to a clear and unambiguous condition, namely that ***spares and accessories did not qualify for remission***. The central question in this dispute is whether the ***decoders and set top boxes*** imported by the applicant are spares and accessories. The respondent contends that they are and are therefore not exempt from taxes under the conditions pursuant to which the Minister gave the applicant tax remission. The applicant on the other hand contends that the decoders and set top boxes are not spares and accessories.

We have considerable doubt whether the applicant’s intended appeal is arguable. It is axiomatic that judicial review is not concerned with the merits of the decision, but rather with the decision making process. It concerns itself with whether the decision making process has been fair, including consideration of whether an applicant had been afforded an opportunity to be heard before the decision was made. ***Lord Hailsham of St. Marylebone*** succinctly made the point in **CHIEF CONSTABLE OF THE NORTH WALES POLICE V. EVANS (1982) 1 WLR 1155** as follows:

***“The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court.”***

Here in Kenya, this Court reiterated the same approach in **MUNICIPAL COUNCIL OF MOMBASA V. REPUBLIC & UMOJA CONSULTANTS LTD, CA NO 185 OF 2001** in the following terms:

***“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account the relevant matters or did take into account irrelevant matters...The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself...”***

(See also **PILI MANAGEMENT CONSULTANTS LTD V COMMISSIONER OF INCOME TAX, CA NO. 154 OF 2007**).

In our opinion the determination of whether the decoders and set top boxes are spares and accessories or whether they are not is a merit decision. The role of the Court is to satisfy itself that in making that determination the decision-maker has acted fairly and has afforded the applicant an opportunity to be heard before making the determination. In other words, the role of the Court is limited to ascertaining whether the decision of the respondent is tainted or vitiated by illegality, irrationality or procedural impropriety. (See **COUNCIL OF CIVIL SERVICE UNIONS & ANOTHER V. MINISTER FOR CIVIL SERVICE (1984) 3 ALL ER 935 AT 937**). We shall refrain from saying more lest we give the impression that we have a concluded mind at this stage or otherwise prejudice the intended appeal.

In addition, we are not satisfied that should the intended appeal succeed, the same would be rendered nugatory. It is not suggested that the applicant will not be able to refund the sum in dispute should the Court find that it is not payable to the respondent. In the circumstances of this case, we find that the applicant has not established an arguable appeal that will be rendered nugatory absent an order for stay of execution. Accordingly, the Notice of Motion dated 2<sup>nd</sup> July 2014 is hereby dismissed with costs to the

respondent.

*Dated and delivered at Nairobi this 21st day of November 2014.*

**P. KIHARA KARIUKI, PCA**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*Copy of the original*

**DEPUTY REGISTRAR**