



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL OF KENYA  
AT NAIROBI**

**Civil Application 91 of 2008**

**COASTAL BOTTLERS LIMITED ..... APPLICANT**

**AND**

**THE COMMISSIONER OF DOMESTIC TAXES ..... RESPONDENT**

*(An application under Rule 5 (2)(b) and Rule 42 of the Court of Appeal Rules for stay of execution pending the hearing and determination of the intended appeal from the judgment/decision of the*

*High Court of Kenya at Nairobi. (Nyamu & Wendoh, JJ) dated 30<sup>th</sup> April, 2008*

**In**

**H.C. Misc. Civil Application No. 1756 of 2005)**

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**RULING OF THE COURT**

By its notice of motion dated 7<sup>th</sup> May, 2008 and lodged in this Court on 9<sup>th</sup> May, 2008, Coastal Bottlers Ltd., the applicant herein, is asking the Court under **Rule 5 (2) (b)** of the Court's Rules for an order:-

***“That this Honourable Court be pleased to an order (sic) for stay of execution and statutory recovery proceedings under the Customs & Excise Act by the Respondent pursuant to the decision and order of the High Court of Kenya (the Hon. Justices J.G. Nyamu and R.P.V. Wendoh) made on 30<sup>th</sup> April, 2008 in the aforesaid High Court Miscellaneous Civil Application No. 1756 of 2005, R V. The Commissioner of Domestic Taxes, ex-parte Coastal Bottlers Ltd., pending the hearing of an appeal from the said decision in the Court of Appeal.”***

The “Respondent” referred to in the above prayer is The Commissioner of Domestic Taxes. It would appear that on 13<sup>th</sup> December, 2005 the respondent demanded from the applicant the sum of K.Shs.137,128,368/- as taxes due from the applicant to the respondent. The applicant then moved the High Court under **sections 8 and 9** of the Law Reform Act, and **Order 53 Rules 1, 3 and 4** of the Civil Procedure Rules for orders of prohibition, certiorari and mandamus in respect of the decision demanding the payment of the stated taxes. Nyamu and Wendoh, JJ rejected that application and the applicant now asks this Court for an order of stay as already set out herein. We must take notice of the fact that the learned Judges of the High Court merely rejected the prayers for the orders of prohibition, certiorari and mandamus. They did not make any order capable of being enforced and that explains the curious manner

in which the prayer before this Court is framed.

Even if we assume in favour of the applicant that its intended appeal, which up to now has not been filed, is arguable and is not a frivolous one, the applicant was still obliged to show to the Court that the success of the intended appeal would have been rendered nugatory if we refuse to grant the order of stay now sought before us. Mr. Suresh Shah, a director of the applicant company in paragraph 7 of his supporting affidavit swears as follows:-

***“I am apprehensive that should the enforcement mechanisms be taken and the appeal succeeds, the company shall suffer very significant prejudice as the sums sought are very considerable and shall significantly hamper the operations of the company without allowing the company to have the substantive issues raised in the appeal addressed. In particular the said amounts sought and due to be made by the applicant are very large and will likely paralyze the operations of the company which is the sole significant supplier of the company’s range of products in the Coastal Region. I therefore believe it is in the interest of justice that the said statutory recovery mechanisms be stayed pending hearing and determination of the appeal.”***

Though Mr. Mugambi, learned counsel for the applicant, did not cite any authorities to the Court, the averment in paragraph 7 above is directly derived from the principle stated by this Court in the case of ORARO AND RACHIER ADVOCATES VS. CO-OPERATIVE BANK OF KENYA LTD. [1999] 1 EA 237 where the Court held that:-

***“In dealing with the issue whether or not success in the intended appeal will be rendered nugatory if a stay is not granted the court ought to weigh the claim of both sides. The Applicant law firm might find themselves in a very tight situation if required to pay the full decretal amount whereas the Respondent bank would not be affected by being kept out of the sum. The balance of convenience overall favoured the Applicant. -----.”***

The decision was subsequently explained in the case of RELIANCE BANK LTD. VS. NORLAKE INVESTMENTS LTD. [2002] 1 EA 227 where the Court held that:-

***“-----. A refusal to grant a stay would cause the Applicant such hardship as would be out of proportion to any suffering the Respondent might undergo while awaiting the hearing and determination of the Applicant’s appeal.”***

We take it that this is what the applicant is stating in paragraph seven of its supporting affidavit.

But what are the circumstances in this particular case? Though Mr. Mugambi appears to have been unaware of the position, Mr. Matuku learned counsel for the respondent, categorically told us that the applicant has in fact paid to the respondent a total of Ksh.62,000,000/- which was the outstanding principal tax demanded. The balance of Ksh.69,603,084/- was made up of penalties and interest and Mr. Matuku further informed the Court that the applicant has in fact applied to the respondent for a waiver of the balance and that the matter is under consideration by the Minister. Since the basic outstanding tax has been paid, no further penalty or interest is being charged. Mr. Mugambi was unaware of these matters. In the circumstances, we do not see that the applicant's intended appeal will be rendered nugatory in any way. We may also add that no relevant evidence was placed before the Court, e.g. the balance sheet of the applicant, from which we could come to the conclusion that if the applicant was to be compelled to pay the outstanding balance, it might be forced out of business. As we have said, despite the averment of Shah that paying the money might force the applicant out of business, the applicant in fact paid Ksh.62,000,000/- and there is no evidence before us that its operations were seriously affected by that payment.

We accordingly order that the applicant’s notice of motion under **Rule 5 (2) (b)** be and is hereby dismissed. The costs of the dismissed motion shall be in the intended appeal.

Dated and delivered at Nairobi this 31<sup>st</sup> day of July, 2009

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

.....

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**