**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI NO. 294 OF 2007 (200/2007 UR)**

**STANBIC BANK KENYA LIMITED ……..……..……. APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY ……..……. RESPONDENT**

**(Application for injunction pending the filing, hearing and determination of an intended appeal from the ruling and order of the High Court of Kenya**

**Nairobi (Wendo, J) dated 23rd November, 2007**

**in**

**H.C. Misc. Application No. 1371 of 2005)**

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**RULING OF THE COURT**

The genesis of the application before us by way of notice of motion dated 3rd December 2007 are two letters from the respondent, the Kenya Revenue Authority, to the applicant, Stanbic Bank Kenya Limited, on matters of the applicant's tax liability. The first letter was dated 2nd September 2002. It was addressed to Messrs KPNG Kenya, which were the applicant's accountants, by one V.N. Muhatia for Deputy Commissioner, Large Tax Payer Office (LTO). It demanded withholding tax from the applicants in respect of Reuters Service. The applicant disputed that demand in its letter dated 29th January 2003 addressed to J.G. Nduati, Deputy Commissioner, Kenya Revenue Authority. That letter was written by one Godfrey Maina, the Manager Tax & Legal Matters for KPNG. Other correspondence ensued between the parties but the second important letter from the respondent was dated 8th September 2005. It was addressed to Finance Director of the applicant. It was written by one J.N. Ojee, Senior Assistant Commissioner, LTO. It stated in pertinent part as follows:

**"Kindly note we are proceeding to demand the tax on the basis that these payments should attract tax as technical fees hence falls under the definition of "management and professional fee." Please settle the amount due (Ksh.7,954,342) to avoid forced recovery measures."**

In response to that letter, the applicant proceeded to the superior court for leave to apply for judicial review orders of *certiorari* and prohibition. It filed chamber summons dated 17th September 2005 seeking those orders. The leave sought was granted on 19th September 2005 by Ibrahim J. and an order

was given that the leave so granted was to operate as a stay and preservation of status quo pending the hearing and determination of the suit. On 30th September 2005, the applicant filed notice of motion dated 21st September 2005 seeking:

**"(a) An order of certiorari removing to this Honourable Court for the purpose of the same being quashed the letter dated 2nd September, 2002 written by V.N. Muhatia for the Deputy Commissioner, Large Tax Payer Office, Kenya Revenue Authority and addressed to Messrs KPNG Kenya and the letter dated 8th September, 2005 written by J.M. Ojee, Senior Assistant Commissioner, Large Tax Payer Office, Kenya Revenue Authority and addressed to the Finance Director, Stanbic Bank Kenya Limited.**

**(b) An order of prohibition to prohibit the respondent or any of its agents or any other party acting for and on behalf of the respondent from further demanding from the applicant or its agents, the sum of Ksh.7,954,342.00 or any sum at all, with respect to this suit.**

**(c) An order of prohibition to prohibit the respondent from taking any recovery measures forced or otherwise against the applicant for the payment of the said sum of Ksh.7,954,342.00 or any sum at all, with respect to this suit."**

That notice of motion was heard by the superior court (Wendo J.). In a lengthy judgment dated and delivered on 23rd November 2007, the superior court made a finding that the applicant had not demonstrated that it was entitled to the orders sought and declined to grant the orders. The motion was dismissed with costs to the respondent. The applicant felt aggrieved by that decision. It filed a notice of appeal dated 28th November 2007 and on 3rd December 2007, it filed this notice of motion in which it is seeking four orders as follows:

**"1. That this Honourable Court be pleased to order an injunction restraining the respondent from demanding and or taking steps to recover tax from the applicant for reuters services for the period 1996 to 1999 pending the filing, hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Nairobi, (Justice Roselyn Wendo) dated 23rd November 2007 in Nairobi Miscellaneous Application Number 1371 of 2005.**

**2. That this Honourable Court be pleased to order that a priority hearing date be given once the intended appeal is lodged.**

**3. The applicant be at liberty to apply for further order and/or directions as this Honourable Court may deem just and expedient to grant.**

**4. That costs of and incidental to this application abide the result of the intended appeal."**

The grounds for the application are, in summary, that the applicant's intended appeal is arguable and that the results of the intended appeal, should it succeed, will be rendered nugatory as the respondent intends to recover the alleged tax which is an enormous amount of money – over Ksh.7,954,342/=. Once recovered, even if the applicant succeeds and the money is refunded, the applicant will still have lost the income that could have accrued to it through investment during the time that money will be held by the respondent as the respondent will not, according to law, refund it with interest. The application was opposed by the respondent which filed a replying affidavit sworn by John Achieng' Orwa, its Senior Assistant Commissioner in the Domestic Taxes – Large Tax Payer Office. The respondent's stand is that the first three prayers sought in the application cannot be granted by this Court as this Court lacks jurisdiction to grant them, and further that the prayer for injunction cannot be granted as under **section 3(2) (a)** of the Kenya Revenue Authority Act Chapter 469 Laws of Kenya as read with **section 16(1) (i)** of the Government Proceedings Act Chapter 40 Laws of Kenya, the Court cannot grant injunction against the Kenya Revenue Authority restraining it from carrying out its duties of collecting taxes. It also contended that in any event, the intended appeal would not be arguable and the success of it, if any, would not be rendered nugatory as the collected taxes would be refunded to the applicant and lastly, that

the applicant would benefit from such collection if the appeal fails as in that case the applicant would escape payment of increased amounts occasioned by penalties during the period the outcome of the appeal will be awaited.

Mr. Gichuhi, the learned counsel for the applicant, at the outset of his submission conceded that injunction order cannot be granted by this Court on the matter before us, it being a matter that was before the superior court by way of judicial review in which the superior court could not have granted injunction order. However, he pleaded with us to exercise our inherent powers under **rule 5(2) (b)** and grant orders we deem fit but which would ensure *status quo ante*. He urged us to interpret prayer 3 of the notice of motion to include an application for stay under **rule 5(2) (b)** and contended that the intended appeal was arguable but the success of it would be rendered nugatory were we to refuse the application.

Mr. Matuku, the learned counsel for the respondent, on the other hand submitted that under **rule 5(2) (b)** of this Court's Rules, only three orders can be issued. These are - order of stay of execution, injunction order and order for stay of proceedings. He maintained that prayers 2 and 3 of the notice of motion cannot be ordered under **rule (5(2) (b)**. Further, Mr. Matuku submitted that under **section 3(2) (a)** of the Kenya Revenue Authority Act as read with **section 16(1) (i)** of the Government Proceedings Act, the actions of the respondent carried out in the course of collecting revenue cannot be injuncted. He also submitted that the intended appeal is not arguable and that its successful outcome would not be rendered nugatory if the application is refused. Lastly, he submitted that as what was before the superior court was an application for judicial review order, the Court, by dint of **section 3(3)** of the Appellate Jurisdiction Act Chapter 9 Laws of Kenya, cannot grant injunction in the matter as the superior court could not have granted an injunction in the matter.

We have anxiously considered the application, the grounds for it, the affidavits by both parties, the able submissions by both counsel and the law.

The application that was before the superior court part of which we have reproduced hereinabove was seeking judicial review orders of *certiorari* and prohibition. It was made under **Order 53 rule 3(1)** of the Civil Procedure Rules. The superior court could not in law issue injunction order in that application. **Section 3(3)** of the Appellate Jurisdiction Act Chapter 9 Laws of Kenya provides as follows:

**"In the hearing of an appeal in the exercise of the jurisdiction conferred by this Act, the law to be applied shall be the law applicable to the case in the High Court."**

That in effect means that we cannot issue an order of injunction prayed for in the first prayer of this application as the superior court could not in law issue injunction order on the application which was before it as that was an application for judicial review under **Order 53 rule 3(1)** of the Civil Procedure Rules.

Mr. Gichuhi appreciated this legal position and readily conceded that that order was not in law available to the applicant. He however asked us, as we have stated, to exercise our inherent powers and treat prayer 3 as an application for stay of execution and then proceed to issue stay order. In our considered view, we cannot do so. First, the third prayer is not specifically seeking stay order. It is seeking that the applicant be at liberty to apply for further orders and/or directions as the Honourable Court may deem just and expedient to grant. The court, as we understand that prayer, is being asked to order that the applicant is at liberty to apply for further order. It is not asking the court to grant an order of *status quo ante*; neither is it asking the court to grant an order of stay of execution of the superior court's order. We agree with Mr. Matuku that we can, under **rule 5(2) (b),** make only three orders, namely an order staying proceedings, an order staying execution of the superior court's order and lastly, an injunction order. This is clearly spelt out in that rule. Our inherent powers revolve around these aspects only. We cannot extend those powers to the realm of creating a prayer not sought in the notice of motion and proceed to grant it as Mr. Gichuhi is asking us to do. In any case, the third prayer does not seek that the *status quo* be maintained. In our view, to go to the extent of interpreting the third prayer to include a prayer for stay of execution or a prayer to grant the maintenance of the *status quo* could be close to our abusing the discretionary powers we have under **rule 5(2) (b)**. We are not prepared to do so.

In any case, even if we were to read the prayer for stay of execution into that prayer, still in law it would not be possible for us to grant it. The orders that the applicant sought were, as we have stated, an order of *certiorari* to quash the letter dated 2nd September 2002 written by Muhatia and the letter dated 8th September written by J.N. Ojee; an order of prohibition to prohibit the respondent or any of its agents from further demanding Ksh.7,954,342/= from the applicant and lastly, an order of prohibition to prohibit the respondent from taking any recovery measures, forced or otherwise, against the applicant for the payment of the said sum of Ksh.7.954,342/= or any sum in respect of the suit. All that the superior court did after hearing the notice of motion was to dismiss the motion with cost to the respondent. Other than an order of costs, the superior court order was negative and could not be executed by either party. That being the case, there is no order the execution of which this Court can stay, as the superior court did not order any party to do anything or to refrain from doing anything that this Court can stay. This view has been taken by this Court in many decisions pronounced in the past and recent past. We need not belabour it any more, but if there be any further need to draw the attention of the legal fraternity to some of those cases, then the recent decision of this Court in the case of **Western College of Arts and Applied Sciences (Weco) vs. Oranga (1976) KLR 63**, where after the predecessor to this Court considered a similar application, Law V.P stated as follows:

**"But what is there to be executed under the judgment the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In the instant case, the High Court has not ordered any of the parties to do anything or refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for stay, to ensue or to restrain by injunction."**

And on his part, Mustafa J.A. who was a member of that bench stated:

**"The temporary injunction asked for by the applicant is extraneous to a stay of execution as it does not relate to what the High Court ordered to be done or not to be done and this Court has no jurisdiction to entertain it."**

In the case of **Mombasa Seaport Duty Free Ltd vs. Kenya Ports Authority – Civil Application No. Nai. 242 of 2006** (unreported) this Court, relying on the **Weco case** (supra) dismissed an application for order of stay to be issued to prohibit the respondent from terminating the applicant's lease, forfeiting the applicant's lease and or interfering in any manner with the applicant's possession of the promises as – very close to what Mr. Gichuhi, if we understood him well, is asking us to do, stating, *inter alia*:

**"Moreover, the order of stay sought in prayer (b) of the notice of motion is neither an order of stay of execution or stay of proceedings or an order of injunction of the species envisaged by rule 5 (2) (b). We believe we have no jurisdiction to grant such an order.**

**The orders sought do not relate to what the superior court decided and we are of the view that we have no jurisdiction to entertain the application."**

Lastly, in the case of **Republic vs. Kenya Wildlife Services & 2 others – Civil Application No. Nai. 12 of 2007** (unreported), the superior court granted the application for leave to apply for judicial review orders but adjourned and later dismissed the application for an order that the leave so granted do operate as a stay of the signing or implementation of any contract of lease in dispute pending the hearing and determination of judicial review proceedings. The aggrieved party, Tourism Promotion Services Ltd, filed a notice of appeal and an application to this Court under **rule 5(2) (b)** for an injunction order to restrain Kenya Wildlife Services from signing any lease of the disputed property pending the determination of the intended appeal from the ruling of the superior court. The Court said in part:

**"The superior court has not therefore ordered any of the parties to do anything or refrain from doing anything. There is therefore no positive and enforceable order made by the superior court which can be the subject matter of the application for injunction or stay. Prima facie, the superior court has not ordered any party to sign the lease. The application for injunction or stay is apparently extraneous to the orders made by the superior court."**

Likewise, in this case, the superior court did not order the respondent to collect the disputed amounts, nor did it order the applicant to pay that money. All it did was to dismiss the judicial review application for *certiorari* and prohibition. There is therefore no positive order it made that can be stayed even if we were minded to read the third prayer of the application before us to include prayer for stay of execution or for an order of *status quo ante* which we cannot do.

The above being our view of the matter, we find it unnecessary to go into other matters raised by the respondent such as whether the respondent can or cannot be injuncted when **section 3(2)** of the Kenya Revenue Authority Act Chapter 469 of the Laws of Kenya is read together with **section 16(1) (i)** of the Government Proceedings Act Chapter 40 Laws of Kenya. We further see no necessity of going into whether the intended appeal, if successful, will be rendered nugatory or not as, in our view, this application cannot succeed.

Accordingly, the application lacks merit. It is dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 8th day of February, 2008.**

**R.S.C OMOLO**

**……..**

**JUDGE OF APPEAL**

**P.K. TUNOI**

**…….**

**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

**…….**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**