



Damasa Wholesalers Limited v Commissioner of Investigations and Enforcement (Commercial Appeal E245 of 2024) [2025] KEHC 3643 (KLR) (Commercial and Tax) (24 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3643 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E245 OF 2024**

H NAMISI, J

MARCH 24, 2025

BETWEEN

DAMASA WHOLESALERS LIMITED APPLICANT

AND

**COMMISSIONER OF INVESTIGATIONS AND
ENFORCEMENT RESPONDENT**

RULING

1. The Notice of Motion dated 23 August 2024 seeks the following orders:
 - i. Spent
 - ii. That there be temporary orders of stay of execution of the Judgement of the Tax Appeals Tribunal delivered on judgment on 12 July, 2024, in Nairobi Tax Appeals Tribunal, Tax Appeal number 418 of 2023 pending hearing and determination of this Application inter parties;
 - iii. That there be orders of stay of execution of the judgement of the Tax Appeals Tribunal delivered on 12 July, 2024 in Nairobi Tax Appeals Tribunal, Tax Appeal Number 418 of 2023 and any further enforcement action thereon pending the hearing and final determination of the Applicant's Appeal.
 - iv. That costs of this Application be in the cause.
2. The Application is supported by the Affidavit of Abdirahman Yakub, sole director of the Applicant, and premised on the following grounds:
 - a. That the Respondent herein obtained judgement against the Applicant in the Tax Appeals Tribunal delivered on 12 July, 2024, in Nairobi Tax Appeals Tribunal, Tax Appeal Number



418 of 2023, which judgement was delivered to the effect that the Appellant/Applicant is liable for Kshs. 7, 642,474.00 in additional VAT in the period 2020 to 2021;

- b. That the Tax Appeals Tribunal while delivering its judgement did not grant any stay of execution orders hence no stay orders are in place;
 - c. That the Applicant being dissatisfied with the whole of the said judgement of the Tax Appeals Tribunal in Nairobi Tax Appeal Tribunal, Tax Appeal Number 418 of 2023 has since lodged an appeal to the High Court at Nairobi (Milimani), appealing against the whole judgment which appeal is still pending hearing and determination;
 - d. That there being no stay of execution orders presently in place, the Respondent may proceed to execution which execution will have adverse effects on the Applicant who stands to suffer substantial loss and damage as it will be rendered unable to continue with its business and pay salaries to its employees while pursuing the appeal against the Respondent and further the Applicant's instant appeal will be rendered nugatory;
 - e. That the Applicant has good grounds of appeal from the said judgement and it ought to be accorded the opportunity to prosecute their appeal;
 - f. That substantial loss will result to the Applicant unless the orders sought are granted;
 - g. That this Application has been made in good faith and without any unreasonable delay;
 - h. That this application ought to be granted in the interest of fairness, equity and justice.
3. The Supporting Affidavit reiterates the grounds on the Application.
 4. The Respondent filed a Replying Affidavit in which it is averred that the judgement rendered on 12 July 2024 partially allowed the appeal by upholding the sum of Kshs 40,956 for income tax and Kshs 7,642,474 for additional VAT bearing a total tax liability of Kshs 7,683,430/=. The taxes in dispute have remained outstanding since 4 April 2023 when the Respondent raised assessments. The Respondent further averred that the judgement being in partial favor, the Respondent will suffer prejudice if the taxes are not collected since the same have crystallized and the Respondent should be allowed to enjoy the fruits of the judgement. The Respondent was of the view that the enforcement of the judgement will not in any way render the intended appeal nugatory. In the event the Court rules in favour of the Appellant, the Respondent is not impecunious as to be unable to comply with the judgement of the High Court.
 5. The Respondent argued that if the Applicant is to succeed in its application for stay, it must satisfy the conditions stipulated in Order 42 Rule 6(1) of the Civil Procedure Rules. Further, if the Court is inclined to allow the Application, the Respondent prayed that the Appellant be ordered to deposit security of 50% of the taxes due to the Respondent.
 6. The Application was canvassed by way of written submissions.
 7. I have considered the application, the Affidavit in support thereof, the Replying Affidavit as well as the respective submissions.
 8. The principles upon which the court may grant stay of execution pending appeal are well settled. Order 42 rule 6 of the Civil Procedure Rules requires that an applicant seeking a stay of execution pending appeal must demonstrate that:
 - a. Substantial loss may result to the application unless the order is made;



- b. The application was made without unreasonable delay; and
 - c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as given by the applicant
9. In *Antoine Ndiaye -vs- African Virtual University* (2015) eKLR, Gikonyo, J opined thus:
- “...stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...”
10. From the foregoing, it is evident that the power to grant stay of execution pending appeal is an exercise of the discretion of the court on the Applicant meeting the conditions set out therein. It is noteworthy that the 3 conditions must be met simultaneously as they are conjunctive and not disjunctive.
11. In the time acclaimed case of *Butt-vs- Rent Restriction Tribunal* (1982) KLR, the Court gave guidance on the exercise of discretion in granting of stay of execution pending appeal. It was held that:
1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
12. The first consideration is whether the application was filed timeously. Judgement of the Tax Appeal Tribunal was entered on 12 July 2024. The Application herein was filed on 23 August 2024 along with the Memorandum of Appeal and Record of Appeal. Though there was delay in filing the application and the Memorandum of Appeal, the delay was, in my view, not inordinate.
13. On the issue of substantial loss, the Respondent contends that the Applicant has only made mention of substantial loss, but not elaborated on the same. It is the duty of the applicant in an application for stay of execution to establish that they will suffer substantial loss if the orders sought are not granted. In *Machira t/a Machira & Company Advocates -vs- East African Standard* [2002] KLR 63, the Court of Appeal, in considering what amounts to substantial loss, held as follows:
- No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR.



This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

14. In responding to the issue of substantial loss, the Applicant submitted that the judgment sum is a colossal and punitive sum which would result in frustration and crippling of the Applicant’s business operations and projects on account of diversion of funds. The frustration and crippling of the Applicant’s finances will also have far reaching consequences as it will jeopardizes the Applicant’s employee’s livelihood and the Applicant’s owners Dependents’ livelihoods. The Applicant’s reputation with its current and potential business associates is also likely to face prejudice should the orders not be granted.
15. On the issue of security of costs, the Applicant submitted that they are ready to meet any conditions on security as directed by the Court.
16. In *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

17. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the *Civil Procedure Act*, I find and hold that the applicants have fulfilled the requirements for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6 of the Civil Procedure Rules.

Disposition

18. The upshot is that the Appellant’s Notice of Motion dated 23 August 2024 is merited. There shall be a stay of execution of the judgement and decree of the Tax Appeal Tribunal delivered on delivered on 12 July 2024 in Tax Appeal Number 418 of 2023 pending the hearing and determination of the appeal on the following conditions:
 - i. The Appellant shall furnish security in the sum of Kshs 3,841,715/=, being 50% of the decretal sum, by way of bank guarantee from a reputable bank within 21 days from the date hereof;
 - ii. Costs in the cause

DATED AND DELIVERED AT NAIROBI THIS 24 DAY OF MARCH 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT



Delivered on virtual platform in the presence of:

N/Afor the Applicant

.N/A.....for the Respondent

Libertine Achieng.... Court Assistant

