



**Pomona Construction Company Limited v Commissioner of  
Domestic Taxes (Miscellaneous Application E016 of 2023)  
[2024] KEHC 2898 (KLR) (Commercial and Tax) (21 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2898 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E016 OF 2023  
A MABEYA, J  
MARCH 21, 2024**

**BETWEEN**

**POMONA CONSTRUCTION COMPANY LIMITED ..... APPLICANT**

**AND**

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

**RULING**

1. Before Court is an application dated 28/6/2023. The same was brought under section 32(1) of the [Tax Appeal Tribunal Act](#) No 40 of 2013, Rule 4 of the [Tax Appeals Tribunal \(Appeals to the High Court\) rules](#) 2015, Order 42 rule 6(2) of the [Civil Procedure Rules](#) 2010 as amended and section 59 of the [Interpretation and General Provisions Act](#) cap 2 of the Laws of Kenya.
2. The application sought the stay of execution of the judgment of the Tax Appeals Tribunal delivered on 28/4/2023 and extension of time for serving the notice of appeal and memorandum of appeal. That in alternative, the memorandum of appeal be deemed to be duly filed and served.
3. The application was premised on the grounds on the face of it and the supporting affidavit of Nicholas Gichohi sworn on 28/6/2023. The applicant's case was that the delay in filing the appeal within 30 days was caused by the fact that it had been unable to obtain the judgment in good time. That the respondent had subjected the applicant to double taxation and asked Equity bank to remit the tax.
4. That its accounts had been restricted by the bank and it was therefore unable to meet its financial obligations in paying salaries and loan repayments. That the appeal raised triable issues with chances of success and the respondent would not be prejudiced by the extension sought.



5. The application was opposed by the respondent. It was canvassed by way of written submissions which I have considered. The applicant submitted that section 32 of the [Tax Appeals Tribunal Act](#) provided that an appeal should be filed within 30 days. That however, the Court has the discretion to extend the time.
6. That the delay was caused by the Tribunal as it took time to release the judgment. That the applicant would suffer substantial loss if the orders for stay are not granted since the applicant would be subjected to double taxation. That the respondent had already issued an agency notice to the applicant's banks and therefore the applicant was unable to access the funds.
7. On his part, the respondent submitted that there was no delay in obtaining the judgment since the copy of the judgement attached to the application was dated 28/4/2023 and that was the date for delivery of the judgment. That the applicant failed to demonstrate the effort made to obtain the judgment. That he was entitled to issue the agency notices and therefore that could not amount to substantial loss. That in any event, the appellant had not provided security for the full satisfaction of the decree.
8. I have carefully considered the rival arguments made by the parties, the submissions and the authorities relied on. There are two issues for determination. The first issue is whether the applicant should be granted leave to appeal out of time and the second whether there should be a stay of execution pending appeal.
9. The dispute emanated from an assessment issued by the respondent amounting to Kshs 13,780,787.00. Aggrieved by the respondent's assessment, the appellant lodged an appeal at the Tax Appeals Tribunal but the same was dismissed. The applicant intends to appeal the said decision however the time within which to file the same had lapsed.
10. Section 32 of the [Tax Appeals Tribunal Act](#) provides: -

“A party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.”
11. Rules 3 and 4 of the [Tax Appeals Tribunal \(Appeals to The High Court\) Rules](#), 2015, provides: -
  3. The appellant shall, within thirty days, after the date of service of a notice of appeal under section 32(1), file a memorandum of appeal with the Registrar and serve a copy on the respondent.
  4. The Court may extend the time specified in Rule 3 if the Court is satisfied that, owing to absence from Kenya, sickness, or other reasonable cause, the appellant was unable to file the memorandum of appeal within that period and that there has been no unreasonable delay on the part of the appellant.”
12. The reasons advanced by the applicant for failure to file the appeal within 30 days was that it took time for it to access the judgment of the Tax Appeals Tribunal. From the record, the Tribunal delivered its judgment on 28/4/2023. The appeal was to be filed before the 28/5/2023 but the present application was lodged on 28/6/2023. The delay was therefore for a month. The court finds that the delay was not inordinate and considering the reasons advanced by the applicant the Court is satisfied that the applicant has given a reasonable explanation.



13. The next issue for determination is whether stay of execution should issue. The principles applicable are provided for under Order 42 Rule 6(2) of the *Civil Procedure Rules* which provides that: -
- 2) “No order for stay of execution shall be made under sub-rule (1) unless:-
- a) The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
14. In this regard, an applicant ought to demonstrate that an application for stay was made timeously, that he would suffer substantial loss and that he is ready and willing to abide by the security for the performance of the decree set by the court.
15. In this case, it is not in dispute that the application for stay of execution was made without inordinate delay. The question is whether the applicant has proved substantial loss and whether security was provided.
16. In *Kenya Shell v Benjamin Karuga Kibiru & another* [1986] eKLR, the Court of Appeal held: -
- “If there is no evidence of substantial loss to an applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”
17. The applicant’s contention on substantial loss was that the respondent had issued agency notices and therefore the company had been unable to meet its financial obligations such as paying salaries and utilities. On substantial loss, the Court ought to consider that in failing to grant stay of execution, the appeal would be rendered nugatory.
18. In this case, the agency notices have already been issued and there is the risk of the disputed tax being paid out. The applicant has proved that it would suffer substantial loss. With regard to security the applicant was willing to provide security.
19. In view of the forgoing, I find merit in the application and the same is allowed on the following terms: -
- a. The applicant is granted leave to file the appeal out of time and the annexed memorandum of appeal is hereby deemed to be as duly filed upon payment of the prerequisite Court fees.
- b. The judgment of the Tribunal delivered on 28/4/2023 is hereby stayed pending the hearing and determination of the appeal on condition that the applicant pays to the respondent a sum of Kshs. 4,000,000/- as security within 30days of the date hereof in default the stay shall lapse.
- c. The cost of the application shall be in the cause.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

