



**Shepherds Hospital Limited v Commissioner of Investigations and Enforcement  
(Miscellaneous Application E016 of 2023) [2023] KEHC 18173 (KLR) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18173 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
MISCELLANEOUS APPLICATION E016 OF 2023**

**F GIKONYO, J**

**MAY 29, 2023**

**BETWEEN**

**SHEPHERDS HOSPITAL LIMITED ..... APPELLANT**

**AND**

**COMMISSIONER OF INVESTIGATIONS AND  
ENFORCEMENT ..... RESPONDENT**

**RULING**

1. In the Motion dated May 10, 2023, the applicant sought, *inter alia* for;
  - i Lifting of the Agency Notices dated April 28, 2023; and
  - ii Stay of enforcement of the decision of Tax Appeal Tribunal made on April 28, 2023 pending the determination of tis appeal.
2. Lifting of the Agency Notice is the substratum of the appeal and it is untenable to try the issue in an interlocutory application.
3. The potent issue is on stay of execution of the decision by the Tax Appeal Tribunal.
4. After hearing both legal counsel, it was apparent they were agreed on the need for stay of execution, except, they differed on the amount to be paid as security for taxes. The respondent proposed a deposit of 60% of the assessed taxes; the applicant proposed 20% thereof. The court, therefore, directed the parties to address the court, through concise written submission, the justification of their respective proposed amount of security.
5. The applicant argued that, 60% of Kshs 8,424,498 is so substantial that it will lead to closure of the applicant’s business which is in the provision of health services to the people of Kenya. The applicant stated that it is not able to raise such substantial sum in its circumstances. They proposed 20% as reasonable security for purposes of appeal.



6. The respondent urged that these taxes are needed for provision of government services which is a public interest venture. They stated that they are also the judgment-holder which should enjoy the fruits of the judgment without undue deprivation. On these reasons, they urged the court to order a deposit of 60% of the assessed taxes.

### **Analysis And Determination**

7. From the material before the court, there is no indication of any tax that is not in dispute in this case. And, this being an appeal, the security to be provided is in the sense of order 42 rule 6 of the *Civil Procedure Rules*.
8. Provision of security under order 42 rule 6 of the Civil Procedure Rules is not intended to be a punishment to the appellant or a form of execution of the decree on behalf of the respondent. It should not also impede access to justice or right of appeal. Therefore, order 42 rule 6 does not entail a policy that courts should insist on deposit of security for the entire decretal sum especially where the decretal sum is quite colossal as would stifle the right of appeal and access to justice (art 48 of the *Constitution*). See *Sewankambo Dickson Vs Ziwa Abby* HCT-00-CC MA 0178 of 2005, the High Court of Uganda at Kampala that: -  
  
“...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals –especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts”.
9. The purpose of security under order 42 rule 6 of the Civil Procedure Rules is to alleviate the concerns of potential difficulties in seeking to recover the decretal sum from an appellant whose appeal is not successful (*Westmont Holdings SDN BHD v Central Bank of Kenya & 2 others*). But, quite a careful balancing is therefore, required in order not to prejudice the competing rights; appellant’s right of appeal; and respondent’s right to enjoy fruits of judgment.
10. The appellant claims that they are going enterprise offering essential health services to the people of Kenya and insistence of a deposit of 60% of the assessed tax would make them shut down their business.
11. Whereas the most important function of taxes, remains and serve as the primary means for financing public goods and services, enforcement of tax decisions should not be used to kill businesses. I should think that, this realization has yielded one great virtue in the tax collector’s charter which emphasizes on friendly enforcement mechanisms which help in the collection of tax but at the same time allows taxpayer’s business to thrive. The law has also given this ideal legal recognition and permits the tax collector and tax payer to enter into an arrangement for payment of undisputed taxes. Fairness also operate in all forms of enforcements and civil execution processes including tax collection. With these things in mind, the argument by the appellant is not irrelevant or idle especially in light of their right of appeal and access to justice. The guiding factor should be; what is reasonable security for the satisfaction of the decree whilst it does not stifle the appellant’s right of appeal and access to justice?
12. A perfect balancing of rights is the one that appreciates that, there is not dominant or subservient party in the eyes of the law. The law knows only of equality of parties in the protection and conferment of benefit of the law.
13. It bears repeating, therefore, that security for taxes should not be a penal measure against a party. But, one that should ensure that there was a balance of interests between parties in the appeal.



### **Conclusions and order**

14. SIn the circumstances of this case, a deposit of 25% of the assessed tax is reasonable security for purposes of this appeal, for it does not stifle exercise of the right of appeal and access to justice by the appellant, nor deny the government the much needed taxes to provide services to the people.
15. I therefore order stay of execution of the decision by the Tax Appeal Tribunal subject to payment of 25% of the assessed tax within 30 days.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS  
29<sup>TH</sup> DAY OF MAY, 2023.**

.....

**F. GIKONYO M.**

**JUDGE**

In the presence of:

1. Mr. Makori – CA
2. M/s Nkurrenah for the applicant
3. Nyandieka holding brief for Wairire for Respondent

