



Icea Lion Life Assurance Ltd v Commissioner of Domestic Taxes (Income Tax Appeal E188 of 2021) [2022] KEHC 11317 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 11317 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INCOME TAX APPEAL E188 OF 2021**

JN MULWA, J

APRIL 28, 2022

BETWEEN

ICEA LION LIFE ASSURANCE LTD APPELLANT

AND

COMMISSIONER OF DOMESTIC TAXES RESPONDENT

(Being an appeal against the Judgment of the Tax Appeals Tribunal delivered on 22nd October 2021 in Tax Appeal No. 82 of 2017)

RULING

1. This ruling is in respect to the appellant's notice of motion application dated October 29, 2021 brought under order 42 rule 6 of the [Civil Procedure Rules, 2010](#) and the inherent powers of the court. The applicant seeks a stay of the enforcement of agency notices dated October 27, 2021 issued to two of its bankers and stay of enforcement of the judgment of the Tax Appeals Tribunal delivered on October 22, 2021 in Tax Appeal No 82 of 2017 pending the hearing and determination of the appeal.
2. The application is supported by an affidavit sworn on even date by the appellant's Chief Executive Officer, George G Nyakundi. The appellant's case is that the tribunal upheld the respondent's demand of taxes in the sum of Kshs 59,315,625 on account of capital gains tax arising from the sale of ICEA Building in October 2015. Consequently, the respondent issued two of the appellant's bankers namely Standard Chartered Bank and Co-operative Bank with agency notices demanding the immediate payment of the assessed taxes. The appellant avers that if enforcement is not stayed, its operations will be greatly disrupted as it will be unable pay its employees' salaries, its clients' insurance claims as well as its suppliers and will be exposed to litigation for breach of contractual obligations.
3. Further, the appellant contends that in the absence of stay orders, its appeal which it deems as arguable with reasonable prospects of success will be rendered nugatory. It also avers that there is a risk that



- the respondent will take further enforcement measures including serving further notices on its other bankers and debtors as well as attachment and sale of its assets. Lastly, the appellant avers that it is willing to comply with any conditions that this court may impose as regards reasonable security.
4. In opposition, the respondent filed a replying affidavit sworn on November 11, 2021 by its officer, Benard Kiagu. He averred that the respondent deserves to enjoy the fruits of its judgment as the disputed taxes have been outstanding from 2017. It further deposes that enforcement of the tribunal's judgment will not render the appeal nugatory since the respondent is capable of refunding the amount demanded in the event that this court rules in favour of the appellant, given that the right to a refund is clearly spelt out in the tax laws. Additionally, he contended that the appellant has not satisfied the condition for stay of execution. The respondent thus urged that this application be dismissed with costs or in the alternative, the court do direct the appellant to deposit security equivalent to the entire taxes in question.
 5. The application was canvassed through both written and oral submissions. During the oral highlighting of the submissions, counsel for both parties informed the court that the only outstanding issue relates to the reasonable security that the appellant should provide for stay orders to be granted by this court. Mr Ruto, learned counsel for the appellant, submitted that the appellant was willing to provide a bank guarantee of 25% of the amount claimed. He relied on *Keroche Breweries Ltd v Commissioner of Domestic Taxes* COA Civil Application No 139 & 140 of 2020 and *Kenya Postel Directories Limited v Commissioner of Domestic Taxes* [2021] eKLR where the Court of Appeal allowed the tax payers to provide security of approximately 10% and 5% of the respective tax amount claimed.
 6. On the other hand, Learned Counsel Mr Nyapara for the respondent submitted that the appellant is a big insurance company and has not demonstrated that it is unable to pay the full amount claimed as security. In his view, the court should therefore order the appellant to pay at least 50% of the same if stay is to be granted and in this regard, reliance was placed on the case of *Rana Auto Selection Limited v Commissioner of Domestic Taxes* HCOMMMISC E259 of 2021. As regards the nature of the security, Counsel submitted that a bank guarantee was unacceptable and insisted on direct payment of the amount claimed.
 7. In rebuttal, Mr Ruto Advocate referred the court to the *Kenya Postel* case (*supra*) where a bank guarantee was considered as suitable security.
 8. The court has considered the parties respective arguments. The only issue for determination relates to the nature and extent of the security that the appellant should be ordered to provide to the satisfaction of the court.
 9. In resolving this issue, the court is required to balance the competing interests of both parties. In *Africa Oil Kenya BV v Commissioner of Domestic Taxes* [2020] eKLR, Majanja J. stated as follows:

“[11] The duty of the court is to balance the interests of the appellant and to ensure that the appeal is not rendered nugatory or that its financial position is imperiled on the one hand by enforcement of the tribunal’s decision. On the other hand, this court recognises that the tribunal has not made a decision that the Commissioner is entitled to enforce an absent appeal and an order of stay.”
 10. The nature and extent of the security to be ordered by the court is dependent on the facts and circumstances of the case at hand. In *Palaeh Limited v Commissioner of Investigations and Enforcement* [2021] eKLR, the court ordered the appellant therein to pay the respondent Kshs 10,000,000/- where the amount of taxes demanded was Kshs 8 Billion. In *Monaco Engineering Limited v Commissioner of*



Domestic Taxes [2021] eKLR, the court ordered the appellant therein to deposit Kshs 20,000,000/- for disputed taxes of Kshs 65,281,768/-. In Sunday Publishers Limited v Commissioner of Domestic Taxes [2021] eKLR, the court ordered the appellant therein to provide a guarantee of Kshs 10,000,000/- from a reputable bank in favour of the respondent for disputed taxes of around Kshs 400 million.

11. Bearing the above authorities in mind as well as the rival interests, it is my considered view that a security of Kshs 15,000,000/- in the form of a bank guarantee from a reputable bank would be most appropriate taking into account the circumstances of the case.
12. Accordingly, the notice of motion dated October 29, 2021 is allowed in the following terms:
 - a. An order of stay be and is hereby issued staying execution of the judgment of the Tax Appeal Tribunal dated October 22, 2021 in TAT Appeal No 82 of 2017 and any further enforcement action thereon, pending the hearing and determination of the appeal or until further orders of the court.
 - b. The appellant shall provide a bank guarantee of Kshs 15,000,000/- from a reputable bank in favour of the respondent within thirty (30) days from the date hereof. In default, the stay orders shall stand discharged.
 - c. The costs of this application shall abide the outcome of the appeal. Orders accordingly.

DATED SIGNED AND DELIVERED AT MILIMANI THIS 28TH DAY OF APRIL 2022.

**JN MULWA
JUDGE.**

