



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**HCCOMITA/E 114 OF 2020**

**MONACO ENGINEERING LIMITED .....APPLICANT**

**VERSUS**

**COMMISSIONER OF INCOME TAXES .....RESPONDENT**

**R U L I N G**

1. The Motion on Notice dated 29/10/2020 was for stay of execution of the judgment and decree of the Tax Appeals Tribunal made on 25/9/2020 pending appeal. The same is brought, *inter alia*, under **Order 42 Rule 6(2) of the Civil Procedure Rules**. The applicant further sought an injunction to restrain the respondent from enforcing the Agency Notice dated 19/10/2020 served upon its bankers Standard Chartered Bank Limited for Kshs. 65,281,768/-.
2. The grounds upon which the application was predicated upon were set out in the body of the Motion and the supporting affidavit of **Stanley Njogu Karari** sworn on 29/10/2020. These were that; over the years the applicant has been tax compliant, on 19/10/2020, the respondent served its bankers an Agency Notice for Kshs. 65,281,768/- for alleged VAT, Withholding Tax and PAYE due to the respondent.
3. That the applicant is aggrieved with the Judgment and decree of the Tax Appeals Tribunal made on 25/9/2020 which gave rise to the said Agency Notice. That the applicant has lodged a Notice of Appeal against the said decision. That the intended appeal is meritorious. That if the Agency Notice is enforced, the applicant may collapse leading to the loss of jobs to its employees. That with the Covid – 19 pandemic, productivity has been at its lowest.
4. The application was opposed by the respondent through the replying affidavit of **Kennedy Okoth** sworn on 16/11/2020. It was contended that the applicant was audited for the years of income of 2013 to 2015. The audit revealed under-declarations of taxes which led to tax liability of Kshs. 65,281,768/-. That the applicant was dissatisfied and filed an appeal at the Tax Appeals Tribunal which was dismissed.
5. It was further contended that the Agency Notice was issued in accordance with the law. That the applicant had not demonstrated that its appeal had any high chances of success. That the Court should require security for the taxes that are due to the Government.
6. The principles applicable in an application for stay pending appeal are well established. The application should be made timeously, the applicant must demonstrate that if the stay is not granted he will suffer substantial loss and security is offered for the due performance of the decree.
7. The judgment sought to be appealed against was made on 25/9/2020. The present application was lodged on 29/10/2020. There was a delay of over 1 complete month after the date of the decision.
8. **Section 32 of the Tax Appeals Tribunal Act, No. 40 of 2013** provides: -  
  
“(1) 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”.
9. From the record, it is not clear when the decision of the Tribunal was communicated to the applicant. Such decisions are supposed to be communicated within 7 days of delivery. In this regard, in the absence of any evidence of the date of communication of the decision, the Court presumes that the same must have been communicated on or before 2/10/2020. The application having been filed on 29/10/2020, I am satisfied that the application was brought timeously.

10. On substantial loss, it was contended that due to Covid-19, the applicant has been starved of revenue and its productivity is at an all-time low. That due to uncertain business environment, its bankers are unwilling to offer it financial accommodation. That if the Agency Notice is enforced, the applicant will automatically collapse.

11. I have considered the aforesaid averments. The respondent did not challenge the applicants' averments. The decree appealed against is a money decree. It was not alleged that the respondent cannot be able to refund the amount demanded in the event the appeal succeeds. However, it was alleged that because of the uncertain business environment, if the decree is enforced the applicant may collapse. In this regard, this Court is satisfied that unless the orders sought are granted, the applicant may suffer substantial loss.

12. The final limb is security. The applicant did not offer any security for the performance of the decree that may ultimately be binding upon it. In **Keroche Breweries Limited vs. Commissioner of Domestic Taxes HC Comm ITA No. E021 of 2020 (UR)**, the Court ordered payment of Kshs. 500 million as security in a claim for Kshs. 9 billion.

13. In **Bella Vista Restaurant Mombasa Limited vs. Kenya Revenue Authority [2016] eKLR**, the Court recognized the financial difficulties of the petitioner and declined to order security as it would have led to the closure of the petitioner's business.

14. In **Awal Limited vs. Commissioner of Investigations and Enforcement [2020] eKLR** and **Victrociset S.P.A. Kenya vs. Commissioner of Domestic Taxes [2018] eKLR**, the Court granted an unconditional stay having considered the financial difficulties the applicants were undergoing.

15. In the present case, apart from statements in the affidavit that the applicant was undergoing financial difficulties, the same was not backed by any evidence. Since the backbone of stay is security, the applicant should have done more than to make sweeping statements that it will collapse if the Agency Notice was enforced.

16. The duty of the Court is to balance between the interest of an applicant not to have its appeal rendered nugatory and the public interest that the Commissioner must collect revenue for the government. In the absence of hard evidence that the applicant's business will be imperilled is ordered to give security, I will grant the stay sought with security. The applicant to give security of Kshs.20,000,000/-.

17. Accordingly, I allow the application dated 29/10/2020 on condition that the applicant pays a sum of Kshs.20,000,000/- as security. Costs in the cause.

It is so ordered.

**DATED** and **DELIVERED** at Nairobi this 20<sup>th</sup> day of January, 2021.

**A. MABEYA, FCI Arb**

**JUDGE**