



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

INCOME TAX APPEAL NO. E 071 OF 2020

MOBIUS MOTORS KENYA LIMITED.....APPELLANT

-VERSUS-

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. If the Judgment of the Tax Appeals Tribunal (the Tribunal) delivered on 30th July 2020 is not stayed then the Tax Payer may face a tax demand of Kshs.73,235,647/= from the Commissioner of Domestic Taxes.

2. The Tax Payer (Mobius Motors Kenya Limited) has filed an appeal against the decision of Tribunal and has moved this Court for stay through a Notice of Motion dated 11th August 2020.

3. The Application is brought under the provisions of order 42 rule 6(1) of the Civil Procedure Rules:-

“6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

4. The application was filed promptly (just about 12 days after the decision of the Tribunal) and so what the Tax payer must now do is to satisfy the other two requirements for grant of such an order. That it will suffer substantial loss if stay is not granted and that it is willing to furnish such security as the Court will order to meet any ultimate decree that may arise from these proceedings.

5. Of substantial loss (which Mr. Machui who deposes an affidavit on behalf of Mobius mischaracterizes as irreparable harm that cannot be compensated in damages), Mobius avers that it relies heavily on capital injections in the form of equity from its parent company. It is deposed that if the Respondent were to recover the disputed amounts then Mobius will be unable to meet its targets and this will make it less attractive for capital injection from the parent company.

6. The second reason may not sit comfortably as a substantial loss to the Tax Payer. It avers that it will be a loss to it for the Commissioner to benefit from a miscarriage of justice.

7. Mobius seeks to demonstrate its financial vulnerability by producing its audited financial report for the year ended 31st December 2019 which shows it with a liability of Kshs.434,331,277/= and a shareholders deficit of Kshs.204,852,532/=. It avers that as at 30th August 2020, this position had deteriorated to a sum of Kshs.649,218,432/= in liability and shareholders deficit of Kshs.389,191,642/=.

8. Looking at the audited reports produced, Mobius has made out a strong case that a payment of Kshs.73,235,647 from its resources would most probably have an adverse effect on its operations. That would be substantial loss.

9. Although this Court is told by Mobius that the whether or not to order security is at the discretion of the Court, the financial position demonstrated by Mobius persuades this Court that grant of such security is necessary. I would rather not paraphrase what counsel for Mobius says of the financial position of his client:-

“If ordered to pay the given total sum of Kshs.73,253,647/= as security it is likely that the Appellant will have to shut down its operations in Kenya, by reasons of insolvency.”

10. There must therefore be a real concern about the ability of Mobius to meet the ultimate decree that could be made against it. Giving of security is therefore absolutely essential so as to protect the Commissioner’s position.

11. In the written submissions filed by the Mobius, it offers a deposit of Kshs.10,000,000/=. The Commissioner on the other hand asks for security of Kshs.45 Million or in the alternative that the amount which the Tax Payer offers be paid directly to it.

12. Bearing in mind the financial difficulties of Mobius but also the need not to jeopardize the Commissioner’s ability to recover the tax in the event the Appeal fails, the Court orders that the Applicant provides a Bank guarantee of Kshs.40 Million as condition for stay.

13. The Notice of Motion of 11th August 2020 is allowed on condition that the Applicant shall, within 60 days hereof, furnish a Bank guarantee of Kshs.40,000,000/= (forty million) for the due performance of the ultimate decree that it may be asked to meet. Each party to bear its own costs in the Motion.

Dated, Signed and Delivered in Court at Nairobi this 12th Day of February 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Court Assistant: Nixon

Lemiso for Respondent

Ndungu for Applicant