



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D.S. MAJANJA J.

TAX APPEAL NO. E027 OF 2020

BETWEEN

COMMISSIONER OF DOMESTIC TAXES.....APPELLANT

AND

BROOKHOUSE SCHOOLS LIMITED.....RESPONDENT

RULING

1. By a judgment dated 9th April 2021, the court allowed the Appellant's ("the Commissioner") appeal by setting aside the Tribunal's judgment dated 27th March 2020 and affirming the Commissioner's Objection Decision dated 27th June 2017 to the extent that the Respondent was required pay KES 140,217,163.00 being the tax obligation of PAYE accruing from non-cash benefits in the form of discounted school fees for teaching staff.

2. The Respondent has now filed the Notice of Motion dated 21st April 2021 made, inter alia, under **Order 42 rule 6** of the **Civil Procedure Rules** seeking stay of execution of the entire judgment pending the hearing and determination of the intended appeal against the decision. The application is supported by the affidavit of John O'Connor, the Respondent's Managing Director, sworn on the same day.

3. The Appellant has opposed the application through written submissions. The Respondent has also filed written submissions. The parties have all cited plethora of authorities which I have considered.

4. An application for stay of execution pending an appeal from the decision of the Court is governed by **Order 42 Rule 6 (2)** of the **Civil Procedure Rules**. In order to succeed, the applicant must demonstrate substantial loss may result unless the order of stay is made. It must also demonstrate that the application has been brought without undue delay and lastly, the applicant must give such security as the court may order for the due performance of the decree or order as the case may be. All these conditions must be met and none is less worthy than the other (see **Kenya Postel Directories Limited v Commissioner of Domestic Taxes ML HC ITA Appeal No. 34 of 2017 [2020] eKLR**). However, our courts have also recognised that the power to order stay is discretionary and must be exercised in such a way that the appeal is not rendered nugatory. This discretion, I would add, is based on the facts and circumstances of each case (see **Halai & Another v. Thornton & Turpin (1963) Ltd [1990] KLR 365** and **Butt v Rent Restriction Tribunal [1982] KLR 417**).

5. In arriving at a balance, the court is to weigh the Respondent's entitlement to exercise its statutory right of appeal and the Commissioner's entitlement to the fruits of its judgment in this case to collect the taxes lawfully due from the Respondent. In doing this, the court should ensure that the appeal is not rendered nugatory by allowing execution to proceed in a manner that would render the ensuing appeal otiose (see **Keroche Breweries Limited v Commissioner of Domestic Taxes ML HC ITA E012 of 2020 [2020] eKLR**, and **Superior Homes (Kenya) Limited v Musango Kithome MKS HC Civil Appeal No. 91 of 2017 [2018] eKLR**). The onus of satisfying the court that unless stay is granted, it will suffer substantial loss is upon the applicant (see **David Morton Silverstein v Atsango Chesoni NRB CA Civil Application No. 189 of 2001 [2002] eKLR**).

6. I have considered the facts of this case and I find as follows. First, I am satisfied that the Respondent has evinced its intention to appeal by lodging its Notice of Appeal. Second, the application has been brought without undue delay. Turning to the issue whether the Respondent will suffer substantial loss should the court deny it stay, I hold that the sum of KES 140,217,163.00 adjudged due to the Appellant is not insubstantial. If execution proceeds, the Respondent's business which comprises offering educational services to local and international students, is likely to shut down. It is not disputed that the Respondent is a going concern, which like most businesses, has been having challenges due to the COVID 19 pandemic. Any execution may affect its reputation and standing as an international school.

7. On furnishing security, the Respondent has indicated that it is prepared to abide by any terms this court may impose as a condition for granting stay of the execution. The nature and amount of security is also dependent on the circumstances of the case. In ***Keroche Breweries Limited v Commissioner of Domestic Taxes (Supra)*** the Court ordered payment of KES. 500 million as security in a tax claim for KES. 9 billion. In ***Monaco Engineering Limited v Commissioner of Income Taxes ML HC ITA No. E114 of 2020 [2021] eKLR***, the applicant was ordered to furnish security of KES. 20,000,000.00 in a tax demand of KES. 65,281,768.00 while in ***Kenya Postel Directories Limited v Commissioner of Domestic Taxes (Supra)***, the appellant was ordered to pay half of the demanded Value Added Tax of KES. 225,333,836.00. In ***Bella Vista Restaurant Mombasa Limited v Kenya Revenue Authority MSA HC Pet. No. 44 of 2014 [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 while in ***Awal Limited v Commissioner of Investigations and Enforcement ML HC ITA No. 26 of 2017 [2020] eKLR*** declined to order security when it was disclosed that the appellant was not running the business.

8. Taking into account all the factors I have outlined above and the cases cited, I allow the Notice of Motion dated 21st April 2021 on the following terms:

(a) A stay of execution of the judgment dated 9th April 2021 be and is hereby granted pending the hearing and determination of the intended appeal on the terms set out hereunder or until further orders of this court or the Court of Appeal.

(b) The Respondent shall furnish a Bank Guarantee from a reputable bank for KES. 15,000,000.00 in favour of the Appellant within a period of forty-five (45) days from the date hereof pending the hearing and determination of the appeal.

(c) In default of compliance, with the terms above the stay of execution shall lapse and the Appellant shall be at liberty to proceed with execution without recourse to the court.

(d) The costs of the application shall abide by the appeal.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2021.

J. M. MATIVO

JUDGE

Court Assistant: Mr M. Onyango.

Mr Otieno, Advocate instructed by Kenya Revenue Authority for the Commissioner of Domestic Taxes.

Ms Macharia with Mr Muhindi instructed by Anjarwalla and Khanna LLP Advocates for the Respondent.