



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

INCOME TAX APPEAL NO. E 003 OF 2021

KENYA REVENUE AUTHORITY.....APPELLANT

-VERSUS-

ERIC OGOLA ADULA.....RESPONDENT

RULING

1. The decision of Tax Appeals Tribunal of 20th November 2020 declared certain goods belonging to Eric Ogola Adula (the Respondent or Taxpayer) to be unmanufactured Tobacco and classified them under HS Code 2401.20.00.

2. The tax implication of that decision is that the goods would attract Excise Duty of 25% and not 35%. In the same decision the Tribunal ordered KRA (the Appellant) to release the goods under dispute to the Respondent and waived any warehouse charges accruing on the part of the Respondent.

3. The decision aggrieves KRA who have filed this Appeal and now, by a Notice of Motion dated 15th January 2021 seeking stay of the impugned decision.

4. In opposing the Application the Tax payer defends the correctness of the decision and argues that the Application before Court is an afterthought brought only after he had filed contempt proceedings in HCC Misc. E. 201 of 2021 to compel the Authority to abide by the orders of the Tribunal. He also thinks that the Application is not brought timeously. Third, he takes the view that there is no proper appeal before the Court as the same was filed out of time without leave.

5. In a further affidavit sworn on 10th March 2021, he deposes that in the next 6 months, presumably from the date of the affidavit, the goods will expire and he would loss about Kshs.18,880,040/= in profits, legal costs, ICPA charges, shipping line charges and the cost of the consignment. He beseeches the Court to direct KRA to provide a Bank Guarantee in his favour should it be minded to grant the stay.

6. If there is no proper Appeal on record, then these proceedings must crumble at once. Section 32 of the Tax Appeal Act provides:-

“Tax as a debt due to the State

(1) A tax payable by a person under a tax law shall be a debt due to the Government and shall be payable to the Commissioner.

(2) A taxpayer who is required to pay a tax electronically under a tax law or section 75 of this Act shall pay the tax electronically unless he or she is authorized in writing by the Commissioner to use another method of payment.”

Rule 3 of the Tax Appeals Tribunal (Appeals to the High Court) Rules 2015 reads:-

“The appellant shall, within thirty days, after the date of service of a notice of appeal under section 32(1), file a memorandum of appeal with the Registrar and serve a copy on the respondent”

7. The process is two stepped. In thirty days of the date of the notification of the decision, the Appellant is to file a Notice of Appeal and then 30 days of the filing of the Notice to file a Memorandum of Appeal. The record available shows that the Notice of Appeal was lodged with the Tribunal on 18th December 2020, within 30 days of the decision. On time. And the Memorandum of Appeal filed in this Court on 14th

January 2021, within 30 days of the Notice of Appeal. Again on time. The Appeal was filed in due regard to process and on time. It is properly before Court.

8. The application before Court is brought under the provisions of Order 42 Rule 6;

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

The provision is explicit on what must be met for a stay to be granted. In addition, the application must be brought without delay.

9. The decision of the Tribunal was on 20th November 2020 and the Motion for stay was brought to Court on 15th January 2021. Although this is about 60 days later, there is the Christmas recess in between and the delay, if any, is not inordinate.

10. On substantial loss, the Authority has produced evidence that the respondent is not registered for VAT, PAYE or Excise duty. That he has not provided his place of business and has not been tax compliant and was a non-filer. These are not denied by the Respondent. The Authority is apprehensive that it will not recover tax from the Respondent if stay is not granted and it eventually succeeds on the Appeal. This apprehension is not a trifle given that the Respondent has not, on challenge, demonstrated ability to pay the tax if called upon to do so.

11. That substantial loss is likely to ensue if stay is not granted has been established and this Court is inclined to grant it. As to whether the stay needs to be conditional, the Authority is the country’s Tax collector and there has been no suggestion that any losses incurred by the Respondent cannot be easily recovered from it. There is no need to impose a Bank guarantee or any other condition as proposed by the Tax Payer.

12. Unconditional stay is granted as sought in the Notice of Motion of 15th January 2021. Costs of the Motion shall be in the cause.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 19TH DAY OF MAY 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:

Chabala for the Applicant.

Anyoka for the Respondent