



**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. E094 OF 2021**

**BETWEEN**

**CHARLES WESONGA MBINGI..... APPELLANT**

**AND**

**COMMISSIONER OF INVESTIGATIONS AND ENFORCEMENT..... RESPONDENT**

***(Being an appeal against the judgment of the Tax Appeals Tribunal at Nairobi dated 21<sup>st</sup> May 2021 in Tax Appeal No. 157 of 2017)***

**RULING**

1. The Appellant has lodged an appeal with the court challenging and having been dissatisfied with the decision of the Tax Appeals Tribunal (“the Tribunal”) dated 21<sup>st</sup> May 2021 that dismissed the Appellant’s appeal and affirmed the Respondent’s (“the Commissioner”) objection decision dated 19<sup>th</sup> September 2017 in respect of an additional tax assessment of KES. 22,067,578.00 it issued to the Appellant.
2. By the Notice of Motion dated 21<sup>st</sup> June 2021, the Appellant now seeks a stay of execution of the Tribunal’s judgment pending hearing and determination of the appeal. The application is supported by the grounds set out on its face and the Appellant’s affidavit sworn on 21<sup>st</sup> June 2021. The Commissioner has opposed the application through the Grounds of Opposition dated 28<sup>th</sup> June 2021. The parties have also filed brief written submissions in support of their respective positions.
3. It is common ground that 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. The courts have recognised that the power to order stay is discretionary, based on the circumstances of each case, and must be exercised in such a way that the appeal is not rendered nugatory (see **Halai & Another v. Thornton & Turpin (1963) Ltd [1990] KLR 365** and **Butt v Rent Restriction Tribunal [1982] KLR 417**).
4. In arriving at a balance, the court is to weigh the Appellant’s entitlement to exercise its statutory right of appeal; The Commissioner’s entitlement to the fruits of its judgment in this case to collect the taxes to be paid by the Appellant and; the court should ensure that the appeal is not rendered nugatory by imposing substantial loss on the Appellant rendering the appeal itself otiose (see **Keroche Breweries Limited v Commissioner of Domestic Taxes ML HC ITA E012 of 2020 [2020] eKLR**).
5. The Appellant contends that his appeal will be rendered nugatory and considering the colossal amounts at stake great prejudice and substantial loss will be occasioned upon him should the execution of the Tribunal’s judgment not be stayed. The Appellant is prepared to furnish security in form of a bank guarantee of KES. 5,000,000.00 and further depones that he has moved the court timeously.
6. On its part, the Commissioner urges that it is entitled to enjoy the fruits of its judgment and be allowed to enforce the Tribunal’s judgment as the Appellant has enjoyed stay of execution since the matter was filed at the Tribunal. The Commissioner further states that it has the ability to refund the taxes in dispute if this Court finds in favour of the Appellant and it is in the interest of the Appellant to pay the said assessed taxes as the said sum continues to accumulate penalties and interests. The Commissioner accepts that should this Court be convinced to grant the Appellant stay, then it should direct the him to give the Commissioner security of taxes of 60% of the principal taxes due.

7. Considering all the circumstances of this case, I now grant the following reliefs:

*(a) An order of stay be and is hereby issued staying execution of the Judgment of the Tax Appeal Tribunal dated 21<sup>st</sup> May 2021 in Tribunal Appeal No. 157 of 2017 and any further enforcement action thereon pending the hearing and determination of this appeal or until further orders of the court.*

*(b) In consideration of the stay in (a) above, the Appellant shall provide a Bank Guarantee for KES. 5,000,000.00 from a reputable bank in favour of the Respondent within thirty (30) days from the date hereof.*

*(c) In default of compliance with the terms aforesaid, the order of stay shall stand discharged.*

*(d) The costs of this application shall be in the appeal.*

*(e) The court shall adjourn to issue directions for the hearing and determination of the appeal.*

**DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2021.**

**D. S. MAJANJA**

**JUDGE**

Mr Kabugu instructed by Kabugu and Company Advocates for the Appellant.

Mr Wairire, Advocate instructed by Kenya Revenue Authority for the Commissioner of Investigations and Enforcement.